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In The

Supreme Court of the United States

October Term, 1992

PONY EXPRESS COURIER CORP.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Does the decision of the Eighth Circuit Court in this case create a direct conflict with the earlier decision of the Second Circuit Court in *Local 851, International Brotherhood of Teamsters v. N.L.R.B.*, 732 F.2d 43 (2nd Cir. 1984), thereby making this decision appropriate for final determination by the Supreme Court?

(2) Do the issues raised in this case present substantial questions with regard to national labor policy, thereby making the decision of the Eighth Circuit Court appropriate for determination by the Supreme Court?

LIST OF PARTIES

Petitioner Pony Express Courier Corp. is a wholly-owned subsidiary of Baker Industries, Inc. which is a wholly-owned subsidiary of Borg-Warner Security Corporation, a publicly-held corporation. Rule 29.1, Rules of the Supreme Court of the United States.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Pony Express Courier Corp., respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Eighth Circuit rendered on December 10, 1992.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix submitted as part of this petition (A. 1-18).

JURISDICTION

On December 10, 1992, the Court of Appeals for the Eighth Circuit issued an opinion denying Petitioner's petition for review and granting enforcement of an order of the National Labor Relations Board dated January 21, 1992 and reported at 306 N.L.R.B. No. 22. Jurisdiction in the Court of Appeals was based on Section 10(f) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(f). On January 20, 1993 the Eighth Circuit Court denied Petitioner's motion to stay the mandate without stating a reason for that decision. This petition for writ of certiorari is filed within ninety (90) days of entry of the judgment by the Court of Appeals for the Eighth Circuit, and this Court's jurisdiction is invoked under 28 U.S.C. § 1254(l).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

§ 158(a)(5).

> It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees . . .
>
> * * *

§ 159(b)(3)

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft

unit, plant unit, or subdivision thereof: Provided, That the Board shall not decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of the persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

STATEMENT OF THE CASE

I. Nature of the Case and Proceedings Below[1]

On May 1, 1991, the Union filed an election petition seeking certification as the collective-bargaining representative of a unit of "full-time and regular part-time employees . . . " including "employee vehicle lease drivers, relief drivers and dispatchers," working at

[1] For convenience, the Petitioner is hereinafter referred to as "Pony" or "Pony Express"; Respondent National Labor Relations Board is hereinafter referred to as the "Board"; and Teamsters Local 120, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO (charging party in the proceedings before the Board) is hereinafter referred to as the "Union." References to the "Act" are to the National Labor Relations Act, as amended, 29 U.S.C. § 141, et seq.

Pony's New Brighton, Minnesota branch facility. An evidentiary hearing was conducted on May 14, 1991 in which Pony contended that the unit petitioned for was inappropriate on the basis that its employees classified as "Courier Guards" were, in fact, "guards" within the meaning of Section 9(b)(3) of the Act and, therefore, the Union could not be certified to represent such a unit since it admits to membership employees other than guards. On June 7, 1991, the Board's Regional Director issued his decision and direction of election determining that the Courier Guards in question were *not* 9(b)(3) guards; they constituted an appropriate unit with other employees; and the Union was qualified to represent such an employee unit at that branch facility. (A. 21-37).

On June 20, 1991, Pony filed a Request for Review of the Regional Director's decision and direction of election urging the Board to determine that the Courier Guards in question were Section 9(b)(3) guards and to dismiss the Union's election petition. On July 15, 1991, the Board denied Pony's Request for Review on the ground that it "raises no substantial issues warranting review." Thereafter, a secret-ballot election was conducted by the Board in the aforementioned employee unit and, on July 26, 1991, the Union was certified as exclusive bargaining representative by the Board's Regional Director.

On October 16, 1991, the Union filed an unfair labor practice charge in Board Case No. 18-CA-11940 based upon Pony's refusal to recognize and bargain collectively with the Union with respect to the certified employee unit; and, on October 29, 1991, the Board issued a complaint against Pony alleging a violation of Section 8(a)(1) and (5) of the Act. Pony timely answered the complaint

and the Board's General Counsel subsequently moved for summary judgment. Thereafter, the Board issued an order transferring the proceeding to itself and a notice to show cause why the General Counsel's motion for summary judgment should not be granted. Pony filed a response admitting its refusal to bargain, but attacking the validity of the Union's certification contending that the Board had incorrectly found in the underlying representation proceeding that the Courier Guards working at Pony's New Brighton, Minnesota facility were not Section 9(b)(3) guards (A. 38-39).

On January 21, 1992, the General Counsel's motion for summary judgment was granted by the Board in its decision and order reported at 306 N.L.R.B. No. 22. In its decision the Board found and concluded that Pony had violated Section 8(a)(1) and (5) of the Act by refusing to bargain collectively with the Union for the aforesaid employee unit; and the Board ordered Pony to bargain with the Union as exclusive representative of its employees upon request. A copy of that Board decision and order appears in the Appendix submitted as part of this petition (A. 38-43).

Pursuant to Section 10(f) of the Act, Pony sought review of said decision and order and the Board filed a cross-application for enforcement of its order. As previously mentioned, the Eighth Circuit Court denied the petition for review and granted enforcement of the Board's order.

II. Statement of the Facts

A. The Business of Pony Express

Pony Express provides the secured transportation of valuable, time-critical commodities for its customers. Pony Express operates in a specialized security market niche in that the type of commodities it transports, as well as requirements of the customer regardless of the commodity transported, require special transportation security and protection. As a consequence, the responsibilities of Pony Express employees are to perform guard functions including enforcing rules against employees and other persons to protect the property entrusted to their possession during the workday, while transporting the commodity. Such protective transportation functions are performed by uniformed, bonded employees classified as Courier Guards.

Among the principal commodities transported by Courier Guards are checks in the process of collection known as "cash letters;" securities between financial institutions, savings and loans and mortgage companies; medical specimens; laboratory specimens; blood; pharmaceuticals; DEA controlled substances; accounting media; documents; cancelled checks; and other commodities of value to customers. Courier Guards provide protective transportation of such commodities from, *inter alia*, the Federal Reserve Bank, commercial banks, savings and loan institutions, drug wholesale distributors, pharmacies and hospitals, in addition to other business customers. Delivery is made by Courier Guards directly to a customer's personnel, to safes located on the customer's premises or to specified places within the customer's

premises, to which only the Courier Guards and customers have access. Courier Guards do not simply "drop-off" packages; rather, they ensure the secure, protected transportation of valuables by opening customers safes and depositing valuables, re-locking safes, disarming and re-setting alarm systems as necessary, and doing whatever else is necessary to maintain security at the customer's location during this process.[2] An important element of the Courier Guard's duties is to maintain the security of a customer's premises by, *inter alia*, operating alarms, locks, safes and other security devices, observing all of a customer's security procedures and rules, enforcing any and all security rules or procedures against other employees and reporting violators to management. The critical element of the Pony Express market niche is that a Courier Guard must demonstrate conduct on behalf of its customers which allows them to feel that their *security* is *strengthened*, not weakened, when Courier Guards are on their premises.[3] Significant responsibilities related to security are an integral part of the Courier Guard's duties and they are summarized in the employee handbook as the obligation to "DETER, DETECT and REPORT."

B. The Functions of a Courier Guard

Courier Guards are uniformed, bonded and carefully pre-screened employees. Courier Guards are required to

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[2] Over 50% of all pickups and deliveries are made before or after business hours.

[3] Indeed, Pony Express incorporates such obligations in its customer contracts.

sign written authorizations for pre-employment investigation that expressly entitle Pony Express to interview law enforcement authorities, family members, associates, friends and other third parties with respect to their characters, general reputation, personal characteristics and mode of living. Extensive background investigations also include a review of previous employers and personal references, motor vehicles records, and a criminal investigation prior to their starting work. A candidate who is determined to have been convicted of a crime involving moral turpitude will not be hired.

Once hired, a Courier Guard is issued a uniform and an identification badge and instructed that proper wearing of the uniform and display of the badge is mandatory. Uniformed Courier Guards are considered to be a part of the security service Pony Express offers to its customers. Uniforms consist of pants, shirts with a patch bearing the Pony Express logo. The patch on the uniform shirt has printed on it either, "Pony Express" or "Courier Guard, Pony Express Courier Corp."

Identification badges have a picture of the Courier Guard, his or her name, height, weight, eye color, date of birth, hair color and signature, as well as "Pony Express Courier Corporation" and "Courier Guard Name" printed on it. The identification badge is issued, and is required to be conspicuously displayed at all times, because an important function of the Courier Guard is to enter customers' premises during worktime or after hours when these locations are otherwise closed. In addition, Courier Guards enter secured areas, operate alarms, locks and safes, and it is important that they be easily

identifiable to customers and others, for example, police officers.

At the beginning of each shift, the Courier Guard reports to the terminal and checks in with a dispatcher or other supervisor. He or she is issued route materials including a route guide, clip board, route keys, vehicle keys and special instructions, if any. The route keys operate locks to customers' premises including otherwise secure doors, offices and safes. At the end of each day, Courier Guards are required to return all keys to the dispatch office.

A Courier Guard then proceeds to the terminal area, picks up commodities and loads and locks the vehicle. Strictly enforced Pony Express policies require that Courier Guards safeguard their shipments by ensuring that the vehicle is locked at all times while on the street. Supervisors conduct field "audits" or inspections of Courier Guards and, in particular, will check to ensure that vehicles are properly locked. Employees who violate this rule, or who otherwise compromise the security of the vehicle, are subject to discipline. The purpose of this rule of course is to assure that nothing is stolen from the vehicle.

Pony Express has also established a strictly enforced and fundamental rule that only authorized personnel are to be allowed into a vehicle by a Courier Guard. Courier Guards are likewise subject to discipline for violating this rule.

Courier Guards make deliveries directly to a customer's employees within their security procedures or to safes or vaults located on a customer's premises. Courier

Guards are required to maintain shipping documents and obtain signatures as receipts for deliveries. Courier Guards are required to assist in the maintenance of security of the customer's premises by observing all customer security procedures and for making sure co-workers who accompany them also comply. Courier Guards are issued keys to customers' facilities and are authorized and required to unlock and secure them again after making a delivery. Where necessary, Courier Guards have access to and utilize customers' security codes and equipment for deactivating, and later reactivating, alarm and other security systems. Courier Guards are likewise subject to discipline for failure to secure a customer's facility.

Customers serviced on the second and third shifts usually utilize safes or vaults to which only Courier Guards or the customers have access on the premises of the customers for the deposit of valuables. The keys provided the Courier Guards allow them to open customer safes or vaults, place deliveries inside and then relock them. Deliveries made to safes, as well as to other locations on a customer's premises may be in locked, sealed and tamperproof containers depending on the contents and the requirements of the customers.

The duties of a Courier Guard include significant security-related responsibilities which are summarized in the employee handbook as the obligation to "DETER, DETECT and REPORT." Courier Guards are made aware that an important part of their responsibility is their fundamental obligation to Pony Express and the customer to deter theft and vandalism. Courier Guards are instructed that deterring theft and vandalism is achieved by exercising preventative security measures, including

the proper use of locks and keys, staying alert, properly wearing the Pony Express uniform, properly operating alarm systems and adhering to all security procedures.

In addition to deterrence, Courier Guards, on behalf of Pony Express and the customer, are obligated to "detect" and report crime or wrongdoing by employees of Pony Express and other persons. Detection by Courier Guards includes the responsibility to "observe" problems or crimes at customers' and Pony Express facilities such as missing vehicles, open or broken windows or doors, fires, smoke, suspicious activity, etc. Courier Guards are required to determine the extent of loss or injury and ascertain as much information as possible including physical descriptions, clothing, speech and mannerisms of suspects, names and addresses of witnesses, etc. Courier Guards are instructed not to attempt to apprehend suspects on their own but to observe carefully all details and to call the police or Pony Express management. This instruction applies when a Courier Guard discovers that a customer's premises, otherwise expected to be secure, is open or unlocked. In such cases, the Courier Guard must call Pony Express management or the police. After this is done, the Courier Guard is to wait at the scene for police or other authorities to arrive, and to cooperate and assist fully in any investigation.

In addition to deterrence and detection responsibilities, the Courier Guard is obligated to "report" theft, vandalism and other wrongdoings, including violations of Pony Express rules or regulations by other employees.

Courier Guards are given training in all aspects of their responsibilities including, in particular, those

related to security. Written Security Instructions are distributed and Courier Guards are required to sign a certification that they read and understood these materials. Lead Courier Guards perform training functions, as do supervisors. In addition, there is on-the-job training which initially lasts for a period of two to four days. Instruction regarding security responsibilities is provided by means of written communications from management to Courier Guards. This instruction is implemented and reinforced through meetings with Courier Guards, individual conferences, notices and other means of communications. Pony Express training materials advise the Courier Guard that the fundamental element of his or her position as a Courier Guard is to provide *protective* transportation that is more secure than ordinary delivery service, that *security* is an important part of Pony Express's service, and because of that, Courier Guards are classified as *guards* rather than merely delivery drivers.

In the end, it is undisputed that Pony Express holds itself out to the public and to its Courier Guards as providing security for its customers' transportation needs, whether on the premises of Pony Express, the premises of the customer, or while in transit. Likewise, it cannot be disputed that such duties are an integral part of the employment relationship between Pony Express employees and Pony Express, whether or not those duties are actually performed by each employee at all times, or whether those security related duties are consistent with the use of common sense to a given set of circumstances. Indeed, one can say that security is overwhelmingly driven by common sense under all circumstances. Finally,

there is no evidence that the performance of transportation duties in any way interfered with the performance of security related duties, both of which are being performed simultaneously and at all times.

C. Appellate Court Decision Upholding the Board

In denying Pony's petition for review and granting the Board's petition for enforcement of its order, the Eighth Circuit Court has held that the Board's finding that Pony's Courier Guards are *not* guards within the meaning of Section 9(b)(3) of the Act is supported by substantial evidence in the record as a whole.

In upholding the Board's decision that the Courier Guards are not "engaged directly and substantially in the protection of customer property," *Purolator Courier Corp.*, 300 N.L.R.B. 812, 814 (1990), the appellate court agreed with the Board's findings that (1) the security training received by Courier Guards is minimal; (2) the security aspects of the Courier Guards' duties are "common-sense" measures and do not require a high level of customer property protection; (3) some items from bank customers, including the Federal Reserve, are left in unlocked containers for pickup; and (4) a memorandum sent to Pony branch managers directs the continued use of the term "Courier Guards" in reference to drivers to help preserve their Section 9(b)(3) guard status (A. 9-13). Finally, the appellate court holds that the Board's 1990 *Purolator* decision has a rational basis and is not inconsistent with the purpose and policy of Section 9(b)(3) of the Act (A. 13-14).

REASONS FOR GRANTING THE WRIT

The recent decision of the Eighth Circuit Court contravenes a 1984 holding of the Second Circuit Court which dealt directly with the application of Section 9(b)(3) guard status to "Courier Guard" employees. Moreover, the Board's new standard for determining guard status, as stated in its 1990 *Purolator* decision, is a marked departure from past Board decisions on this subject and is inconsistent with the legislative purpose and policy of Section 9(b)(3).

I. Decision of the Eighth Circuit Court in Conflict with Earlier Decision of Second Circuit Court that Courier Guards are Section 9(b)(3) Guards.

The Board initially dealt with the status of "courier employees" under Section 9(b)(3) in *Interstate Co.*[4] There, the Board, in an uncontested litigation, declined to find guard status as to an employee of a restaurant chain whose duties merely included picking up money from various restaurants and transporting it to a central commissary.[5] The Board stated that the courier was employed "not to guard the money of the employer, but rather to transport it from place to place.[6], [7] As such, since the

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[4] *Interstate Co.*, 125 N.L.R.B. 101 (1959)

[5] *Id.*

[6] Unlike the Courier Guards at issue herein, the single employee involved in *Interstate Co.* apparently had no duty related to enforcing rules of his employer to protect security or safety.

[7] *Id.* at 106

employee would confront no potential conflict of loyalty, in the absence of any obligation to protect the property, the lack of guard status was consistent with the purpose of Section 9(b)(3).

The Board also considered the applicability of Section 9(b)(3) to couriers in *Brink's Inc.*[8] There, the Board stressed that "the only issue presented [was] when couriers protect[ed] property for the Employer's customers.[9] The Board in *Brink's Inc.* focused on the couriers' protective duties and that the couriers were clearly guards within the meaning of Section 9(b)(3). The Board concluded that the employee's duties as a "courier" were typical of all couriers which did not preclude applicability of Section 9(b)(3).[10] As in the case *sub judice*, the couriers in *Brink's* transported non-negotiable items, such as canceled checks and correspondence between banks. Further, the couriers were unarmed, wore uniforms bearing the Brink's name, were subject to a pre-hire investigation and, significantly, were expected to protect the property entrusted to them. The Board reasoned that "[t]he fact that the couriers transport[ed] only nonnegotiable papers . . . [was] irrelevant. The property, although nonnegotiable, [was] clearly of considerable value to the customer who engage[d] the employer's services for its safe and timely delivery.[11] Given the duty to protect the property of the employer's customers, whether at the

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[8] *Brink's Inc.* 226 N.L.R.B. 1182 (1976).

[9] *Id.* at 1183.

[10] *Id.*

[11] *Id.* at 1184.

Brink's location or that of the customer, it was determined that the couriers were within the scope of Section 9(b)(3).

Relying on *Brink's*, the Board has consistently applied Section 9(b)(3) guard status to Courier Guards. For example, in *MDS Courier Service, Inc.*,[12] the Board found that since the Courier Guards were "employed to protect the valuable property of the Employer's customers," they were guards within the meaning of the Act.[13] Furthermore, in a series of Purolator Courier Corporation cases, the Board reiterated in 1981, 1982, and 1983 its conclusion that the couriers examined therein were guards within the meaning of Section 9(b)(3) because "the basic function of these Courier Guards involve[d], directly and substantially, the protection of valuable property of the Employer's customers."[14]

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[12] *MDS Courier Service, Inc.*, 248 N.L.R.B. 1320 (1980).

[13] *Id.* at 1321.

[14] *Purolator Courier Corp.*, 266 N.L.R.B. 384, 385 (1983). *See also Purolator Courier Corp.*, 265 N.L.R.B. 659, 660 (1982); *Purolator Courier Corp.*, 254 N.L.R.B. 599, 661 (1981), Significantly, the Board's newly advanced criteria for the variations among couriers as to uniforms, training and security checks of prospective employees is irrelevant because the Board has previously expressly found that "such minor alleged differences as the instances in which Courier Guards were hired before their security clearance or initial security training programs were completed, or in which they were permitted to drive without uniforms, did not change the status." *Purolator Courier Corp.*, 266 N.L.R.B. at 385. The issue is whether the employees have an obligation to protect property and safety or enforce rules against other persons at any point during the performance of their duties within the context of the divided loyalty dilemma, not mere operational details reflecting different security pro-

In *Local 851, International Brotherhood of Teamsters v. N.L.R.B.*, 732 F.2d 43 (2d Cir. 1984), the 2nd Circuit rejected the Union's argument that Purolator's Courier Guards were merely truck drivers and not 9(b)(3) guards; placing particular emphasis on their duty of safeguarding the valuable property entrusted to them and the responsibility of securing the premises of their employer's customers. The court pointed out that the Board's "consistent interpretation for thirty years of the statutory term to encompass more than plant guards comports with the statutory language and the legislative history." *Id.* at 44.

Local 851 constituted the only appellate court decision dealing directly with the application of Section 9(b)(3) to Courier Guard employees until the Eighth Circuit's recent decision herein. Although the 1984 decision was cited to both the Board and the Eighth Circuit in the proceedings below, neither commented on its applicability or nonapplicability to this case. It is submitted that the Eighth Circuit Court's decision on the Section 9(b)(3) question is now in direct conflict with the earlier decision of the Second Circuit Court on the same matter and that, therefore, the Supreme Court should exercise its judicial discretion and grant Pony's petition for writ of certiorari. Rule 10.1(a), Rules of the Supreme Court of the United States. Since, to our knowledge, there are no cases

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cedures among various guard employers, whether or not they are performing the identical security function for various customers. It is a qualitative not a quantitative analysis. *See Wells Fargo Alarm Services*, 289 N.L.R.B. 562 (1988); *A.W. Schlesinger Geriatric Center*, 267 N.L.R.B. 1363 (1983); *See also Walterboro Mfg. Co.*, 106 N.L.R.B. 1383 (1953).

pending in the lower courts that may resolve this conflict, or more clearly frame the issue that is the subject of the conflict; and since this Section 9(b)(3) issue is likely to reoccur in these and other appellate circuits in the future, the instant conflict is one that can only be resolved by the Supreme Court.

II. The Decision of the Eighth Circuit Court is Appropriate for Supreme Court Determination Because Issues Raised in this Case Present Substantial Questions with Regard to National Labor Policy.

Since 1947, the application of Section 9(b)(3) to guards, plant guards and watchmen, whether "in-house" or supplied by a contract guard service, has been virtually undisputed. In *Western Electric Co.*[15] the Board set forth the first analytical framework to apply to Section 9(b)(3) cases. There, the Board undertook a careful examination of the employees' duties and adopted a well-reasoned decision that was beyond challenge. The guards in *Western Electric* were paid hourly, wore uniforms, and were armed (but they were not deputized or militarized). Further, their duties were to guard the plant area against unauthorized entry and departure by employees or other persons. These employees were also mobile as are Courier Guards in that they patrolled the plant premises to ensure that fire regulations were observed by employees and other persons, and they reported employee rule infractions to plant authorities. The Board concluded that the employees were guards because their duties related

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[15] *Western Electric Co.*, 76 N.L.R.B. 400 (1948).

"primarily to the preservation of the employer's property and maintenance of plant discipline.[16]

The Board has consistently held that employees similar to Courier Guards who perform the functions of guarding property or persons are encompassed by Section 9(b)(3), despite minor variations in job characteristics. As such, the Board in a subsequent *Western Electric* case, found guard status as to employees who also were unarmed.[17] The Board found that even though the employees were *not armed* or *deputized*, like Courier Guards, they were nevertheless guards because they performed "the usual duties of plant protection employees, enforcing company rules designed for the protection of company property."[18]

The nature of an employer's operations is likewise not dispositive to Section 9(b)(3) guard status. For example, in *Union News Co.*, the Board held that "barrier guards" at an ice-skating rink were guards within the meaning of Section 9(b)(3).[19] There, the employees wore

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[16] *Id.* at 402.

[17] 85 N.L.R.B. 563 (1949), *modified*, 87 N.L.R.B. 183. Notably, since *Western Electric*, it is irrelevant to an employee's status as a guard under Section 9(b)(3) whether guards are armed or deputized, *See, e.g., Crumley Hotel, Inc.*, 134 N.L.R.B. 113, 121 (1961) (security employees who maintained order on the employer's premises and protected hotel guests and property were guards); *Broadway Hale Stores, Inc.*, 215 N.L.R.B. 46 (1974) (unarmed fitting room checkers were guards); *Wackenhut Corp.*, 196 N.L.R.B. 278 (1972) (unarmed security toll operators were guards).

[18] *Id.* at 565.

[19] *Union News Co.*, 112 N.L.R.B. 584 (1955).

distinctive uniforms and badges; were empowered to prevent spectators from defacing the ice rink; restrained spectators from congregating in passageways leading to the rink; kept unauthorized persons from gaining admission to the skating area without paying; and remained mobile by patrolling the skate house to insure that patrons did not steal the employer's skates. Based on these duties and functions, the Board concluded that "barrier guards" were guards within the meaning of Section 9(b)(3).[20]

More recently, in *Peninsula Hospital Center*, the Board applied Section 9(b)(3) to hospital guards.[21] There, the undisputed evidence clearly established that the guard employees like Courier Guards "enforce[d] against employees and other persons rules to protect property of the Employer [and] to protect the safety of persons on the employer's premises.[22]

Watchmen are likewise considered guards within the meaning of Section 9(b)(3). For example, in *H.O. Canfield Co.*, the Board held that watchmen, who were responsible for merely patrolling the plant, protecting company property and preventing unauthorized entry by other persons at night, were within the scope of Section 9(b)(3) "by virtue of their plant-protection duties."[23] Further, the Board in *Fruit Growers Supply Co.*, stated that employee's

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[20] *Id.* at 587.

[21] *Peninsula Hospital Center*, 219 N.L.R.B. 139 (1975).

[22] *Id.*

[23] *H.O. Canfield Co.*, 76 N.L.R.B. 606, 610 (1948).

plant-protection duties, not other factors, were dispositive to qualify watchmen within the meaning of Section 9(b)(3).[24] Specifically, the Board found, contrary to the Decision:

> The fact that these watchmen [were] not armed, deputized, or uniformed and [had] been instructed against the use of bodily force in the performance of their duties, the fact that they [were] supervised by a utility foreman to whom they report[ed], and finally, the previous practice of the Employer and Intervenor to bargain collectively concerning the watchmen [were] not factors sufficient to detract from their status as guards within the meaning of the Act.[25]

Contrary to the Decision, variations in degree which do not affect the essential security obligations of watchmen with respect to their employer do not affect the guard status under Section 9(b)(3). For example, the Board has found Section 9(b)(3) status for watchmen who were both armed,[26] and unarmed.[27]

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[24] *Fruit Growers Supply Co.*, 94 N.L.R.B. 909 (1951).

[25] *Id.* at 910 n.3 (citations omitted).

[26] *See, e.g., Weyerhauser Co.*, 132 N.L.R.B. 84 (1961); *Ertel Mfg. Corp.*, 118 N.L.R.B. 1338 (1957).

[27] *See e.g., Aluminum Corp.*, 117 N.L.R.B. 1221 (1957) (an employee was a guard despite employer and union agreement which included the guard in non-guard unit on the condition that he was unarmed); *Hickory Chair Co.*, 116 N.L.R.B. 1105 (1956). *See, also, Allen B. Dumont Laboratories, Inc.*, 88 N.L.R.B. 1296 (1950) (guard status conferred upon contracted out watchmen supplied by independent detective agency to guard premises other than his employer's).

It is important to note that, contrary to the Board's Decision herein, historical analysis has resulted in the conclusion that the Section 9(b)(3) analysis is not quantitative but qualitative. Thus, the limited performance of property protection duties during working time while performing non-security related duties does not detract from an employee's guard status.[28] In *Walterboro Manufacturing Co.*, the Board held that employees who spent 75% of their work time performing regular maintenance work and the remainder of their time performing watchmen duties, were nonetheless guards.[29]

> Neither the statutory language nor the legislative history [gave] any indication of an intent to exclude part-time guards from the definition of "guards." The legislative history demonstrate[d]

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[28] The Board has consistently held that the part-time performance of protective and enforcement duties, which create the threat of divided loyalty nonetheless, brings an employee within the purview of the purpose and policy of Section 9(b)(3). *See, e.g., A.W. Schlesinger Geriatric Center*, 267 N.L.R.B. 1363 (1983) (maintenance employees considered guards who spent 50-70% of work time on security functions); *Raymond Metal Prods. Co.*, 223 N.L.R.B. 127 (1976) (clerks who substitute for guards 25% of their time were covered by Section 9(b)(3); *Reynolds Metals Co.*, 198 N.L.R.B. 120 (1972) (firemen who spent at minimum 25% of their time performing guard duties were guards within the meaning of the Act). This rationale arises not from the type of guard employees being considered within the ambit of Section 9(b)(3), but from the policy behind the statute. Thus, the concept applies equally to the Pony Courier Guards as it does to plant guards, watchmen or armored car guards, which is not a function of quantifying the potential for the divided loyalty to occur.

[29] *Walterboro Manufacturing Co.*, 106 N.L.R.B. 1383 (1953).

> that Congress was concerned with the possibility that if guards were included in production units their loyalty to fellow union members might conflict with their duty to report to their employer derelictions of duty of violations of rules by employees. An employee who spent only part of his time as a watchman would, of course, [still] be in a position where the conflict between his loyalty to fellow union members and to his employer [albeit] exist only part of the time . . . [But] [i]t is the nature of the duties of guards and not the percentage of time which they spend in such duties which [was] and should be controlling.[30]

It is apparent that the Board by its decision herein has begun a process of limiting the scope of Section 9(b)(3) based upon factors irrelevant to the essential Congressional construct of Section 9(b)(3) and years of Board precedent.

In short, the Board has, disingenously ignored the Congressional history and hundreds of decisions it rendered previously.

The superimposed, artificial limitations placed on Section 9(b)(3) herein would effectively preclude the inclusion within the scope of Section 9(b)(3) of watchmen,[31] barrier guards,[32] hospital guards,[33] unarmed plant

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[30] *Id.* at 1384. *See also Blue Grass Industries*, 287 N.L.R.B. 274, 300 (1987).

[31] *Western Electric Co., supra; H.O. Canfield Co., supra.*

[32] *Union News Co., supra.*

[33] *Peninsula Hospital Center, supra.*

guards,[34] alarm service guards,[35] and armored vehicle guards,[36] wholly apart from the Courier Guards before the Board in the case *sub judice*. In short, the stated limitation on Section 9(b)(3) set forth in this case is simply not supported by prior case law. Further, the Board's recent analysis in this regard is not supported by the legislative history of Section 9(b)(3) and the language of Section 9(b)(3) provides little consolation in this regard.[37]

With all respect to the Board, there can be no denying its attempt to rewrite Section 9(b)(3) is unsupported as observed by the Eighth Circuit in a previous case involving fire watch employees.[38] Given the implications of the decision herein through the definition of a "guard," the

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[34] *Weyerhauser Co., supra; Ertel Mfg. Corp., supra; Aluminum Corp., supra; Hickory Chair Co., supra; Allen B. Dumont Laboratories, Inc., supra; Walterboro Manufacturing Co., supra.*

[35] *Burns Electronic Security Services, Inc.*, 256 N.L.R.B. 860 (1981); *Sterns & Foster*, 119 N.L.R.B. 446 (1957); *MGM Grand Hotel, infra.; Wells Fargo Alarm Services, supra.*

[36] *Armored Motor Service Co.*, 106 N.L.R.B. 1139 (1953); *Dunbar Armored Express, Inc.*, 211 N.L.R.B. 687 (1974); *Wells Fargo Armored Service Co.*, 270 N.L.R.B. 787 (1984).

[37] S. Conf. Rep. No. 510 on H.R. 3020, 80th Cong., 1st Sess. 47 (1947); Legislative History at 551. Section 9(b)(3) encompasses any employee employed "as a guard to enforce against employees and other persons rules to protect property belonging to the employer or for which the employer is responsible or to protect the safety of persons on the employer's premises." Such is fundamentally at odds with the recent *Purolator* decision and the case *sub judice*.

[38] *McDonnell Aircraft Co. v. N.L.R.B.*, 827 F.2d 324, 329 (8th Cir. 1987).

Board is failing to provide a coherent framework for guard employers subject to the Act.

Nonetheless, the Board's artificial analysis would still require a finding of guard status as to the Courier Guards because "the statutory concept of guards obviously is not limited to individuals who function as police officers," *Id.* Yet, the Board determined because Courier Guards are not "authorized to use physical force except in extremely limited circumstances, and then only to protect life and not property," they were outside the scope of Section 9(b)(3). Such a tortured analysis is a means to suggest that in order to fall within Section 9(b)(3), the performance of police type functions are necessary as a matter of law.

Despite the legislative history and the congressional intent behind Section 9(b)(3), and over fourteen years of applying that provision to Courier Guards, the Board issued its decision in *Purolator Courier Corp.*, 300 N.L.R.B. 812 (1990), the predicate for the Board's decision is the instant case, in which it held, based on the facts of that particular case, that "Courier Guards" therein were not 9(b)(3) guards since their "basic function" did not involve "directly and substantially the protection of valuable property of the Employer's customers." *Id.* at 815.[39] However, the *sine qua non* factor that the "basic function" of a

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[39] The factors the Board relied upon in finding those employees to be nonguards were: (1) Purolator advertised itself to the public as a transport delivery service (unlike Pony in the instant case); (2) Purolator employees made after-hours pickups inside customer premises in a very small number of cases (again, unlike Pony in the instant case); (3) Purolator employees were not bonded or self-insured, and were seldom required to

Courier Guard must be the "direct and substantial protection" of valuable property of the employer's customers has, heretofore, never been the litmus test for determining guard status under Section 9(b)(3). *See*, e.g. *N.L.R.B. v. American Dist. Tel. Co.*, 205 F.2d 86, 90 (3d Cir. 1953). It is a qualitative not a quantitative analysis. *See*, *Wells Fargo Alarm Services*, 289 N.L.R.B. 562, 563-64 (1988) (basic function service technician); *Blue Grass Industries*, 287 N.L.R.B. 274, 300 (1987) (basic function "watch and sweep" maintenance); *Jacques SYL Knitwear, Inc.*, 247 N.L.R.B. 1525, 1534 (1980) (basic function timekeeper); *MGM Grand Hotel*, 274 N.L.R.B. 139, 139-40 (1985) (basic function monitoring electronic systems); *A.W. Schlesinger Geriatric*

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deactivate burglar alarms on customer premises (again, unlike Pony in the instant case); (4) although Purolator distributed material to employees which stressed security and the necessity of taking precautions it did not formally discuss the material with its employees (again, unlike Pony since John Fleming became the New Brighton branch manager); (5) although Purolator employees were specifically instructed to lock their vehicles when unattended, in practice it was not uncommon for employees to keep passenger sides of vehicles unlocked in hot weather because of a lack of air conditioning; (6) instances where packages which were to be delivered to residences were left unsecured with neighbors (Pony makes no deliveries to private residences); (7) Purolator did not expect its employees to use any force to safeguard customer property, and they received no training or instruction on how to fend off theft attempts (again, unlike Pony); (8) Purolator employees were not required to enforce against employees or other persons rules to protect company property, nor were they instructed to safeguard premises of customers (again, unlike Pony in the instant case); and (9) Purolator employees were never audited to ensure that such security measures were being carried out (again, unlike Pony in the instant case). 300 N.L.R.B. at 814-815.

Center, 267 N.L.R.B. 1363 (1983) (basic function night and weekend maintenance); *Broadway Hale Stores*, 215 N.L.R.B. 46, 47 (1974) (basic function fitting room checker). The Board's current restrictive interpretation of Section 9(b)(3), as articulated in its 1990 *Purolator* case as well as the instant case, is inconsistent with the objective of that statute in that such an interpretation would exclude from coverage employees with extensive rule enforcement duties against others in the protection of their employers' or customers' properties in situations involving substantial potential for a conflict of loyalties. Such restrictive interpretation warrants the conclusion that the Board's new interpretation is unreasonable and clearly inconsistent with the purpose and policy of Section 9(b)(3) of the Act.

Over forty-five years ago, Congress made it clear that it intended Section 9(b)(3) to be broadly construed to insure that the potential divided loyalty problem would be avoided wherever it might arise within the guard context. Conference Report No. 510 on H.R. 3020, 80th Cong. 1st Sess. 47 (1947). *See* 93 Cong. Rec. 6444, *Reprinted in* II N.L.R.B., Legislative History of the Labor Management Relations Act, 1947, at 1551. *See also, Truck Drivers Local No. 807 v. N.L.R.B.*, 755 F.2d 5, 9 (2d Cir. 1985). As observed by the Eighth Circuit Court in *McDonnell Aircraft Company, supra*, the Board has chosen to interpret Section 9(b)(3) very broadly over the years, finding that the statutory term "guard" includes not only plant guards who police their employers' premises, but also alarm service employees, armored car drivers and courier service employees such as those who comprise the unit at issue in this case. 827 F.2d at 326. It was not until the 1990 *Purolator* case that the Board decided to interpret Section

9(b)(3) more narrowly in factual situations similar to the Purolator cases of the early 1980s.

The goal of Section 9(b)(3) was and still is to avoid situations in which employees who have particular obligations to their employer beyond the traditional employment relationship (e.g. "guards") are subjected to the divided loyalty dilemma. The record evidence before the Board and the Eighth Circuit conclusively established that the "basic function" of Pony Courier Guards was and is to protect the valuable properties of Pony's customers, including the premises of those customers outside normal business hours when the majority of pickups and deliveries are made and the potential for divided loyalty is very real. It is the Courier Guard's obligations to Pony which, in turn, contracts with its customers to provide a security service, that compels the finding that those Courier Guards are 9(b)(3) guards. In no American industry, save the security industry, does the employer-employee relationship include this fundamental obligation of loyalty, and the guard's obligation to his employer must exceed his obligation to any non-guard labor organization as a construct of the employment relationship. This is the balance that was struck by Congress in enacting Section 9(b)(3) in 1947.

Although the Board, as the federal agency charged with the administration of the Act, has the power to change its construction of Section 9(b)(3) if such change is both reasonable and consistent with the statute's legislative purpose; the "direct and substantial protection" test as used by the Board in its 1990 *Purolator* decision and the instant case invites a forbidden quantitative analysis which has the ultimate effect of reading Section 9(b)(3)

right out of existence, something neither the Board nor the Eighth Circuit has the power to do through rule-making or case-by-case interpretation. The statutory language does not permit a quantitative analysis and cannot be reconciled with any application of the "directly and substantially" test which, like the Board's analysis in the case *sub judice*, seeks to subjectively weigh guard versus nonguard functions. Were subjective weighing tests determinative of 9(b)(3) guard status, then an armed guard driving an armored truck all or most of his work day would be held to be a nonguard since his job is "directly and substantially" driving that vehicle; whereas his identically trained and outfitted partner seated in the rear compartment would be held to be a statutory guard since his only duties are to protect the currency and other valuables carried in that armored vehicle.

The only true inquiry in a Section 9(b)(3) case must be whether the indicia of guard status exists (i.e., the enforcement of rules and the protection of property). Neither the Board nor the Eighth Circuit Court in this case may find that the congressionally-mandated factors are present and then explain them away as not rising to the level of "directly and substantially." As previously noted, the loyalty dilemma which marks guard status is inextricably intertwined in the duties of Pony's Courier Guards; therefore, the Board and the Court below committed prejudicial error in construing Section 9(b)(3) as allowing a determination of non-guard status based on an impermissible quantitative analysis.

However, even assuming *arguendo* that a quantitative test is appropriate under Section 9(b)(3), the Board and

the appellate court erroneously determined that the present case was indistinguishable from the 1990 *Purolator* situation. Clearly, the record evidence before the Board and the Eighth Circuit conclusively showed that the basic function of Pony Courier Guards was and is to protect the valuable properties of its customers, including customers' premises outside normal business hours when the majority of pickups and deliveries are being made. In the series of *Purolator* cases decided in the early 1980s, the Board reiterated its conclusion that the couriers examined therein were 9(b)(3) guards because "the basic function of these Courier Guards involved, directly and substantially, the protection of valuable property of the Employer's customers." *Purolator Courier Corp.*, 266 N.L.R.B. at 385. In this case the Board and the Eighth Circuit Court should have distinguished the relevant facts from those that existed in the 1990 *Purolator* case and, instead, applied the correct rationale of the Board's earlier decisions.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Eighth Circuit Court of Appeals.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-1292

Pony Express Courier, Corp., Petitioner, v. National Labor Relations Board, Respondent.	* * * * * * *	Petition for Review of an Order of the National Labor Relations Board

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No. 92-1579

Pony Express Courier, Corp., Respondent, v. National Labor Relations Board, Petitioner.	* * * * * * *	Application for Enforcement of an Order of the National Labor Relations Board

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Submitted: September 16, 1992

Filed: December 10, 1992

Before McMILLIAN, Circuit Judge, BRIGHT, Senior Circuit Judge, and WOLLMAN, CIRCUIT JUDGE.

McMILLIAN, Circuit Judge.

Pony Express Courier Corp. (Company) petitions this court for review of a final order[1] of the National Labor Relations Board (Board) issued on January 21, 1992. The Board granted the General Counsel's motion for summary judgment and found that the Company refused to bargain in violation of sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act (Act), 29 U.S.C. § 158(a)(1), (a)(5) (1988). In support of its petition, the Company argues the Board erred in finding (1) the Company's drivers (courier-guards) were not "guards," as that term is defined in section 9(b)(3) of the Act, 29 U.S.C. § 159(b)(3), and (2) the company's dispatchers were not "supervisors" as defined in section 2(11) of the Act, 29 U.S.C. § 152(11). The Board requests enforcement of its order pursuant to section 10(e) of the Act, 29 U.S.C. § 160(e). For the reasons discussed below, we deny the Company's petition for review and grant the Board's petition to enforce the order of the Board.

BACKGROUND

The Courier-Guards

The Company operates a national courier business. One branch of this business is located in New Brighton, Minnesota, and is responsible for operations in Minnesota, Wisconsin, and portions of North and South Dakota. The Company transports a variety of items for banks and businesses, including food stamps, payroll and bank checks in the process of collection, bank records, repair

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[1] 306 N.L.R.B. No. 22 (Jan. 21, 1992).

parts, computer parts, work tapes, interoffice correspondence, medical supplies and specimens, drugs, baby powder, Dr. Scholl's products, and eyeglasses. The Company transports neither cash nor jewelry.

The New Brighton branch operates under the supervision of a Branch Manager and an Operations Supervisor, both of which fall within the statutory definition of supervisor contained in the Act. There are three groups of courier-guards operating under the supervision of the New Brighton facility, numerically divided as follows: 40 to 45 who drive routes in the outlying areas, 25 who begin and end their routes at the facility, and a few who transport items between the drivers in the outlying areas and the facility. Generally, each courier-guard drives alone and utilizes a route sheet which lists the names and addresses of the customers along with the appropriate door to use to gain entry. Although courier-guards are required to wear the company uniform, they are not armed.

The courier-guards operate a variety of vehicles; half are employee-owned and are leased to the Company. The storage compartment of many of these employee-owned vehicles cannot be locked. The Company supplies the remainder of the vehicles, consisting of the following: vans, which can be locked, 16' straight trucks and line haul vehicles, some of which do not have locks. Although the company handbook instructs the employees to properly lock their vehicles, testimony indicated that this practice is not followed at all times during pickup and delivery. There was additional testimony that some courier-guards have left the engines on their vehicles running during pickup and delivery. Finally, checks and

documents collected from the Company's bank customers are placed in plastic bags or other containers, some of which are not locked.

Courier-guards make deliveries to customers during business hours, although half of all pickups are collected after business hours. Approximately 10-20% of the Company's bank customers provide the courier-guards with keys or card keys for access to the premises. Pickups at these facilities are apparently made from lock boxes. Additionally, IBM, one of the Company's regular customers, provides the small number of courier-guards who handle its items exclusively with computer access codes for entry into its facilities. Items for pickup at IBM are left in foyers or hallways inside the building.

The training received by the courier-guards typically consists of two components: riding with another driver or dispatcher along the route to which they will be assigned and being instructed to read the company handbook. Although the company has a policy of conducting criminal background investigations of its new employees, there is some question whether this has been done in practice.

Training in security matters is limited to that gained from a discussion on security aspects with the Branch Manager and that gained from the company handbook, which instructs courier-guards to protect the property of both the Company and the customers. According to the company handbook, the methods of accomplishing this include the proper use of locks and keys, maintaining alertness and generally following all security procedures.

The company handbook places responsibility for the customer's building on the courier-guards if entry is made during "non-working hours." Once the courier-guards gain entry into customers' buildings, their only function is to pick up and deliver packages. If the courier-guards find a particular building unlocked when it should have been locked, the company handbook instructs the courier-guards to call the police rather than enter the location. Finally, the company handbook prohibits the use of physical force "unless absolutely necessary to protect your life or the life of another."

The Dispatchers

Two dispatchers work out of the New Brighton facility, one operating on the first shift from 6 a.m. until 2 p.m., and the other operating on the second shift from 2 p.m. until 10 p.m. A "lead-courier" apparently performs the functions of dispatchers during the third shift from 10 p.m. until 6. [sic] a.m. At the beginning of each shift, the dispatcher on duty is responsible for issuing timecards, keys and gasoline credit cards to courier-guards and making sure the courier-guards inspect their vehicles. The dispatchers may also assist in unloading and sorting incoming items and loading outgoing vehicles.

While the courier-guards are on their routes, the dispatchers work in the office, mainly dealing with customers and courier-guards by telephone and tracking items which are missing or undelivered. At the end of the shift, the dispatchers receive delivery documents from the courier-guards and check their accuracy. The dispatchers also ensure that the courier-guards punch out

and leave the facility after completing their routes. Additionally, dispatchers sometimes serve as replacements for absent courier-guards.

Aside from a temporary exception, the dispatchers have no authority to hire or terminate employees. In late 1990, dispatcher Donovan Belford was instructed by former operations Supervisor Sheila Starkey to hire employees because the Company was shorthanded. As a result, approximately ten employees were hired during a two-month period. The dispatchers generally act as a conduit between management and the courier-guards; they report requests for time off to either the Operations supervisor or Branch Manager who makes the ultimate decision. The management representative then may request that this decision be conveyed to the courier-guard by the dispatcher. The dispatchers may make recommendations for the transfer of a courier-guard from one route to another for the purposes of cross-training.

The dispatchers likewise have little authority in disciplining courier-guards. On three occasions Belford was involved in the disciplinary process; however, in two of those instances he made no recommendation of discipline, and in the third he simply advised the Branch Manager that there was a problem which needed to be addressed. The record reveals that dispatcher Richard Vallis was involved in four incidents of discipline, all of which consist of his signature appearing as a "supervisor" on written disciplinary notices. The Branch Manager made the final decision on the appropriate discipline in all of these instances. As with the decisions on time-off requests, the dispatcher may inform the courier-guards of the disciplinary decision made by the Branch Manager.

Finally, it appears that dispatchers made "recommendations" for permanent employee status for probationary employees, to the extent that silence by the dispatcher regarding the employee would be considered a positive "recommendation."

Procedural

On May 1, 1991, Teamsters Local 120 of the International Brotherhood of Teamsters, Chauffeurs, Warehouseman & Helpers of America, AFL-CIO (the Union), filed a petition with the Board for certification as the collective bargaining representative of a bargaining unit consisting of both the dispatchers and courier-guards at the facility. During a hearing before the Board on May 14, 1991, the Company contended that its courier-guards were statutory guards within section 9(b)(3) of the Act, which would exclude them from representation in a bargaining unit consisting of employees other than guards. The Company also contended that the dispatchers were statutory supervisors as defined in section 2(11) of the Act, which would remove them from the protection of the Act. On June 7, 1991, the Board's Regional Director issued his decision finding the bargaining unit appropriate and directing an election.

On June 20, 1991, the Company filed a request for review of the Regional Director's decision which was denied by the Board on July 15, 1991, because it raised no substantial issues warranting review. A secret ballot election was held in the certified unit. The Union was elected as collective bargaining representative and was certified on July 26, 1991. The Company thereafter refused to

bargain and an unfair labor practice charge was filed by the Union on October 16, 1991, alleging a violation of sections 8(a)(1) and 8(a)(5) of the Act. The General Counsel subsequently filed a motion for summary judgment, which was followed by a transfer of the proceeding to the Board and an issuance of a notice to show cause why the motion should not be granted. The Company filed a response admitting its refusal to bargain and asserting the invalidity of the certification due to its contention that the courier-guards were statutory guards within the meaning of section 9(b)(3) of the Act.

On January 21, 1992, the Board granted the General Counsel's motion for summary judgment, finding a violation of sections 8(a)(1) and 8(a)(5) of the Act and ordering the Company to bargain with the Union. It is this order that the Company petitions this court to review; the General Counsel seeks enforcement of the order.

STANDARD OF REVIEEW

The Company has refused to bargain with the Union in order to obtain judicial review of the certification decision which was made by the Board. This is the accepted method of obtaining such review, as a certification granted pursuant to section 9(c) of the Act is not a final order subject to review by this court. *See, e.g., AFL v. NLRB*, 308 U.S. 401, 404-07 (1940); *Waverly-Cedar Falls Health Care Ctr., Inc. v. NLRB*, 933 F.2d 626, 628 (8th Cir. 1991) (*Waverly*). An order to bargain, however, granted by the Board in an unfair labor practice proceeding, is a final order which can be appealed under the Act. *See* 29 U.S.C.

§ 160(e), (f). The Company may raise the alleged erroneous certification decision made by the Board as an affirmative defense to the unfair labor practice charges. *Technicolor Gov't Servs., Inc. v. NLRB*, 739 F.2d 323, 326 (8th Cir. 1984).

The Board has broad discretion in certifying an appropriate bargaining unit because of its expertise in this area. *Allied Chemical & Alkali Workers, Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 171 (1971); *NLRB v. Chem Fab Corp.*, 691 F.2d 1252, 1256 (8th Cir. 1982) (*Chem Fab*). Its factual findings regarding both guard and supervisory status under the Act will be upheld if supported by substantial evidence on the record considered as a whole and unless the findings are arbitrary and capricious. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490-91 (1951); *Waverly*, 933 F.2d at 629; *NLRB v. Target Stores, Inc.*, 547 F.2d 421, 423 (8th Cir. 1977). We hold that the Board's findings that the Company's courier-guards are not guards within section 9(b)(3) of the Act and that the Company's dispatchers are not supervisors within section 2(11) of the Act are supported by substantial evidence when viewed on the record as a whole.

DISCUSSION

The Courier-Guards

Section 9(b)(3) of the Act, 29 U.S.C. § 159(b)(3), prohibits the Board from certifying a bargaining representative for a unit of guards if the bargaining unit also contains nonguard employees. That section provides that the Board shall not:

> decide that any unit is appropriate for [collective bargaining] if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

As this court has previously emphasized, the Board's determination of guard status under section 9(b)(3) has not always been uniform. *See McDonnell Aircraft Co. v. NLRB*, 827 F.2d 324, 326 (8th Cir. 1987). However, the "common theme" of interpretation throughout the history of this section has been the original legislative policy of avoiding divided loyalty of those employees entrusted with the authority to enforce plant rules and protect property. *Id.* at 326-27. The requirement that the employee have a duty to protect property is not limited to company property, but rather has been extended by the Board to cover property of customers of armored car carriers. *See Brink's, Inc.*, 226 N.L.R.B. 1182 (1976).

The Board's latest pronouncement on the status of "courier-guards" appears in the case of *Purolator Courier Corp.*, 300 N.L.R.B. 812 (1990) (*Purolator II*). The Board, in *Purolator II*, affirmed the standard, previously set forth in another decision involving the same employer, *Purolator Courier Corp.*, 266 N.L.R.B. 384 (1983) (*Purolator I*), requiring that in order to qualify for guard status under section

9(b)(3) of the Act, the employee must be "engaged directly and substantially in the protection of customer property." 300 N.L.R.B. at 814. In determining that the employees in *Purolator II* were not statutory guards under this standard, the Board relied on several factors: the minimal security training and instruction received, the lack of authorization to use weapons or force in protection of property, the small percentage of deliveries where keys are required to gain access to customers' premises, the employees, minimal accountability to the employer for the property involved, and the fact that the employer held itself out to the public as a delivery service. *Id.* at 815.

In applying this standard to the present case, the Board concluded that the Company's courier-guards were not statutory guards within the ambit of section 9(b)(3) of the Act. The Company contends that the basic function of its courier-guards does involve, substantially and directly, the protection of customer property. It contends that the findings of the Board are not supported by substantial evidence because (1) the security training received by courier-guards is not minimal, (2) customer property is not transported in unsecured containers and the vehicles used for transportation are not sometimes left unlocked and unattended, and (3) its courier-guards follow security procedures specifically designed to safeguard customer property and premises. We will address the first and third arguments together.

In the present case, the Board found, and substantial evidence in the record supports, that the security aspects of the courier-guards' duties are common-sense measures and do not require the level of protection to customer

property that would afford them true guard status under the Act. The security training received by courier-guards is limited to the company handbook instructions and what little direction is given by the Branch Manager in employee interviews. The security measures delineated in the company handbook include the proper use of locks and keys, but there is evidence that some vehicles were not locked during delivery, either by choice or impossibility. Other measures advocated by the company handbook are limited to such behavior as "maintaining alertness, proper wearing of the uniform, a sharp personal appearance, proper operation of alarm systems, and following all security procedures covered in . . . training."

It is true that the courier-guards make pickups and deliveries during non-working hours and thus have some responsibility for the premises of the customer. They are prohibited from allowing strangers to enter the building with them after hours and, according to the company handbook, may be required to deactivate alarms and secure the building upon their exit. Even so, the record supports the Board's finding that, once on the premises, their primary duty is to pick up or deliver packages. According to the company handbook, if a courier-guard finds the doors unlocked when they should not be, he or she is instructed not to enter but to call the police. The company handbook generally prohibits the use of force to protect the property of the customer. These cautionary procedures are, in our opinion, common-sense measures which could be characteristic of any driver employed by a pickup and delivery service.

Contrary to the assertion by the Company, testimony found in the record reveals that items from some bank

customers, including the Federal Reserve, are left in unlocked containers for pickup. Finally, we cannot ignore a Company memorandum, contained in the record, which was sent to branch managers and instructed them to insist that employees use the term "courier-guards" in referring to drivers in order to help preserve their guard status under the Act. Merely bestowing a particular label upon the drivers neither expands their function nor magically transforms them into statutory guards under the Act, because we look to duties, not job titles. *International Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 396 n.13 (1986); *NLRB v. Chicago Metallic Corp.*, 794 F.2d 527, 531 (9th Cir. 1986). Under these facts, we must uphold the Board's decision that the courier-guards were not engaged directly and substantially in the protection of customer property and were thus not statutory guards within section 9(b)(3) of the Act.

The Company also argues that the *Purolator II* standard is a departure from past decisions of the Board and is inconsistent with the purpose and policy of section 9(b)(3) of the Act. our review of such a standard for purposes of this argument is whether it has a rational basis and is consistent with the purposes of the Act. *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786-87 (1990). The Board, as any agency charged with the administration of a statute, has the power to change its construction of the statute if such change is consistent with the legislative purpose and is reasonable. *See id.; NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 265-66 (1975). *See also American Fed'n of Gov't Employees, Local 3884 v. FLRA*, 930 F.2d 1315, 1324 n.12 (8th Cir. 1991) ("[W]e agree that ordinarily we would defer to an agency's construction of

a statute it is charged with administering, even when that construction represents a departure from past practice, so long as the agency's construction is reasonable."). Even assuming for purposes of analysis that a departure from past practice exists, the Board's construction of the Act as set forth in *Purolator II*, mandating a case-by-case approach utilizing a variety of factors in determining the status of a guard under the Act, is certainly reasonable, if not preferred.

Therefore, having addressed the validity of the *Purolator II* standard, we hold that the Board's factual finding that the courier-guards in the present case were not statutory guards under the Act is supported by substantial evidence viewed on the record as a whole.

The Dispatchers

Under the Act, employers are not required to bargain with unions who represent supervisors. 29 U.S.C. § 164(a). This is because supervisors are not entitled to protection due to their exclusion from the definition of the term "employee." *Id.* § 152(3). Section 2(11) of the Act, 29 U.S.C. § 152(11), defines the term "supervisor" for purposes of our analysis, as follows:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is

> not of a merely routine or clerical nature, but requires the use of independent judgment.

Thus, under the statutory definition, an individual must have the authority to exercise only one of the enumerated functions, because this requirement is read in the disjunctive. *Schnuck Mkts., Inc. v. NLRB*, 961 F.2d 700, 703 (8th Cir. 1992); *Chem Fab*, 691 F.2d at 1256; *NLRB v. Harmon Indus., Inc.*, 565 F.2d 1047, 1049 (8th Cir. 1977). The limitation is that such exercise must demand the use of independent judgment and not simply be of a routine nature. *Schnuck*, 961 F.2d at 703.

As with the finding of non-guard status, the finding of non-supervisory status of the dispatchers by the Board is a factual one and will be upheld if there is substantial evidence in the record to support it. The Company contends that the Board's determination is not supported by substantial evidence because the Board gave little weight to the fact that one dispatcher was given the responsibility for hiring approximately ten employees in late 1990. The Company claims the dispatchers have authority to grant and recommend time off for other employees as well as to recommend disciplinary actions on some occasions. Finally, the Company cites the salaried status of the dispatchers and the disproportionate ratio of supervisors to employees which would result from the Board decision as significant evidence of the supervisory function of the dispatchers.

The Board found that the dispatchers generally have no hiring authority and that the special authority given to Belford in late 1990 to hire employees was due to exceptional circumstances and was limited in duration. Indeed,

the record shows that no hiring decisions have been made by the dispatchers since that time. The position of the Board, that a temporary grant of power to hire employees, as a result of special circumstances of need, is not sufficient to bestow supervisory status on the dispatchers, is a reasonable interpretation of the statutory language.

The Board also concluded that the dispatchers simply exercised a reporting function on matters of discipline and time off. The Board examined several individual incidents of dispatcher conduct, some involving Vallis and others involving Belford. There were four instances involving Vallis where the evidence cited by the Company consists of three written disciplinary warnings and one written suspension with his signature. The testimony of both Belford and Fleming indicate that three incidents involving Belford consisted of Belford's reporting the incident to Fleming, who, in those cases, decided on the discipline and instructed Belford to communicate the result to the employee or instructed Belford to follow company policy. Upon our review of the record, we agree with the Board that the function of the dispatchers with respect to disciplinary action was merely to report potential infractions to management and to communicate the ultimate disciplinary decisions made by management to the courier-guards. Similarly, testimony of Belford supports the Board's finding that he had no authority to grant requests for time off, but merely reported the requests to the Operations Supervisor or Branch Manager who bore the ultimate responsibility for granting such requests.

The Company also contends that the Board failed to give substantial weight to the pay differential between dispatchers and courier-guards. We find this factor unpersuasive, as it does not result in the granting of authority to exercise independent judgment, a prerequisite for finding supervisory status under the Act. *See Monotech v. NLRB*, 876 F.2d 514, 517-518 (5th Cir. 1989) (upholding finding of supervisory status where greater hourly pay was only one of a variety of considerations, including such factors as the authority to recommend wage increases for employees and the authority to discipline).

Finally, the Company argues the Board failed to give adequate consideration to both the disproportionate supervisor-employee ratio which would result if the dispatchers were found not to be supervisors and the fact that dispatchers are the highest ranking employees on duty during some shifts. Although supervisor-employee ratio is important in some situations, it cannot be determinative where the putative supervisors lack the authority to exercise independent judgment. *Waverly*, 933 F.2d at 630. For the same reason, neither can the rank of an employee be determinative, although we are not convinced that the dispatchers actually occupy a higher "rank." *See NLRB v. KDFW-TV, Inc.*, 790 F.2d 1273, 1279 (5th Cir. 1986) (rejecting argument that directors, producers, associate producers and assignment editors at TV station [sic] are supervisors because of high-ranking status); *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1467 (7th Cir. 1983) ("Although on the evening (3 p.m. to 11 p.m.) and night (11 p.m. to 7 a.m.) shifts the licensed practical

nurses are the highest-ranking employees on the premises, this does not ipso facto make them supervisors."). Considering the fact that the dispatchers do not exercise independent judgment in areas of operation of the Company's business, e.g., hiring, disciplining, etc., neither the supervisor-employee ratio nor the fact of being a higher ranking employee can elevate the dispatchers to supervisory status.

For the reasons cited above, we hold that the Board's factual determination that the dispatchers are not supervisors under the Act is supported by substantial evidence viewed on the record as a whole.

Accordingly, we deny the Company's petition for review and grant the Board's petition to enforce the order of the Board.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 92-1292	*	
Pony Express Courier, Corp.,	*	
Petitioner,	*	Petition for Review of an Order of the National Labor Relations Board
v.	*	
National Labor Relations Board,	*	
Respondent.	*	Application for Enforcement of an Order of the National Labor Relations Board
No. 92-1579	*	
Pony Express Courier, Corp.,	*	
Respondent,	*	
v.	*	
National Labor Relations Board,	*	
Petitioner.	*	

JUDGMENT

These appeals were submitted on the petition for review of an order of the National Labor Relations Board and on the application for enforcement of an order of the National labor Relations Board, administrative record, appendix, briefs of the parties, and were argued by counsel.

After consideration, it is hereby adjudged and decreed that the order of the National Labor Relations

Board is affirmed in accordance with the opinion of this Court.

December 10, 1992

/s/ Michael E. Gans

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PONY EXPRESS COURIER CORP.

Employer

and

TEAMSTERS LOCAL UNION NO. 120, I.B.T., AFL-CIO

Petitioner

Case 18-RC-15020

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9*(c)* of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3*(b)* of the Act, the board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce with the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. 1/

3. The labor organization*(s)* involved claim*(s)* to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer

within the meaning of Section 9*(c)(1)* and Section 2*(6)* and *(7)* at the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9*(b)* of the Act: 2/

> All full-time and regular part-time courier-guards employed by its Branch operation located at New Brighton, Minnesota, including line haul drivers, lead couriers and dispatchers; excluding office clerical employees, managerial employees, professional employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit*(s)* found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are this in the unit*(s)* who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause

since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by TEAMSTERS LOCAL UNION NO. 120, I.B.T., AFL-CIO.

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. **Excelsior Underwear, Inc.**, 156 NLRB 1236 *(1966)*; **N.L.R.B. v. Wyman-Gordon Company,** 394 U.S. 759 *(1969)*. Accordingly, it is hereby directed that within 7 days of the date of this Decision 2 copies of an election eligibility list, containing the names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned ~~Officer-in-Charge of the Subregion~~ who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Minneapolis Regional Office, 316 Federal Courts Bldg., 110 South Fourth St., Minneapolis, MN 55401, on or before June 14, 1991. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1717 Pennsylvania Avenue, NW., Washington D.C. 20570. This request must be received by the Board in Washington by June 21, 1991.

Dated June 7, 1991,

at Minneapolis, Minnesota

/s/ Ronald M. Sharp
Regional Director,
Region Eighteen
National Labor
Relations Board

1/ The Employer, Pony Express Courier Corp., is a Delaware corporation with headquarters in North Carolina and branch operations in several states. The Employer is engaged in the business of transporting commodities and other things of value. During the 12-month period ending February 26, 1991, a representative period, the Employer's New Brighton, Minnesota Branch provided services to customers located outside the State of Minnesota which were valued in excess of $50,000, and during that same period, the Employer purchased and received at its New Brighton Branch goods and materials valued in excess of $50,000 directly from suppliers located outside Minnesota.

2/ The Petitioner seeks to represent a unit of the Employer's drivers and dispatchers who are employees of its Branch operation at new Brighton, Minnesota. The Employer contends that a question concerning representation does not exist since its drivers, whom it classifies as courier-guards, are guards within the meaning of Section 9(b)(3) of the Act whom the Petitioner is disabled from representing because it is a labor organization which admits to membership employees other than guards. The Employer also contends, contrary to the Petitioner, that its dispatchers are supervisors within the meaning of Section 2(11) of the Act. The Employer asserts that its first and second shift lead couriers are not statutory supervisors; the Petitioner implicitly joins in this position. Although neither the Employer nor Petitioner contend that the lead courier on the third shift is a statutory supervisor, the Employer requests that his status be determined in this proceeding.

The Employer is engaged in courier operations in 36 states. Its Branch at New Brighton, Minnesota engages in operations in the States of Minnesota, North Dakota, South Dakota and Wisconsin. In charge is a Branch Manager and an Operations Supervisor, both of whom the parties agree are statutory supervisors. There are three groups of drivers: those who begin and end their routes at the Branch's New Brighton headquarters, approximately 25 in number; those who drive routes in outlying areas, approximately 40 to 45 in number; and a few line haul drivers who function as a connecting link between the Branch headquarters and outlying drivers by transporting items to and from the outlying areas. All of these drivers, as well as lead couriers, function as courier-guards.

Some of the Employer's largest customers are IBM and the Federal Reserve Bank in Minneapolis, Minnesota. The Employer transports a variety of things for businesses and banks. It does not transport cash or jewelry, but transports food stamps, payroll checks and bank checks in process of collection. Other items transported include repair parts, various kinds of bank records, computer parts, work tapes, inter-office correspondence, medical supplies and specimens, drugs, baby powder, Doctor Scholl's products, and eyeglasses.

Courier-guards who drive from the New Brighton Branch are assigned routes on a permanent basis. Before beginning their daily routes, they unload incoming items, sort them and load them onto the proper vehicle for delivery. Normally, each courier-guard drives by himself making use of a route sheet that informs him of the name and address of the customer and the door to use to gain entry to the customer's premises. The courier-guards who drive from the Branch work on three daily shifts. The record does not show the hours of work of the line haul drivers or the drivers who work only in outlying areas.

The Employer's handbook instructs courier-guards to protect its property and the property of customers, by, among other things, the "proper use of locks and keys." Branch Manager Fleming, who began employment in mid-December 1990, testified that he discusses the "security aspects of the position" with prospective employees as part of his effort to correct the failure of his predecessor to adhere to the Employer's policies. The Employer's handbook states that "vehicle doors must be kept locked at all times." Decals in the Employer's vehicles instruct the operator to lock the vehicle and remove the keys

when leaving the vehicle. In practice, however, vehicles are rarely locked during brief stops and sometimes the engine is left running. There is no evidence that vehicles are actually locked while a courier-guard is on duty inside. Although vehicles are capable of being locked, many are not provided with locks. The Employer's Executive Vice President, whose office is in North Carolina, and who has never visited the New Brighton Branch, testified that bank data and checks are transported in locked bags. A witness for the Petitioner who makes pickups and deliveries to banks and the Federal Reserve, testified that bags furnished by the Federal Reserve are not locked and checks from various banks are contained in plastic bags with a twist-tie closure. Deliveries to banks during business hours are given to tellers, bookkeepers or to the first bank employee the courier-guard encounters. More than half of all pickups are made after the end of business hours. After bank business hours, the courier-guard may use a key to gain entry to some banks and leave items in a hallway. One bank leaves its cancelled checks at a nearby bar to be picked up by a courier-guard. The Employer's former Operations Supervisor, who resigned eight weeks before the hearing on February 26, 1991, testified that she knew of only one bank that required a key for entry and that the driver on that route kept the key at all times. An exhibit constructed after the February 26 hearing and submitted by the Employer at the hearing on May 14, 1991, shows that keys, including one key card, are needed for access to bank materials at 32 of the more than 300 commercial banks served by the Branch. That evidence, however, does not show the number of banks at which pickups or deliveries are made after hours, nor does it show the area of the premises the key or card unlocks, except in one instance the

exhibit indicates a "Door Key" and in two instances it indicates a "Box Key."

The work of the five courier-guards on third shift is the transportation of materials exclusively for IBM. Some IBM facilities require an access code for entry and the same code is used at all of these facilities. Materials to be picked up are placed in a foyer; at one facility IBM leaves packages in a hallway to which the outside door is unlocked. At another facility, IBM changed the access code without informing the Employer and left its packages on "the stoop."

Courier-guards wear uniforms; they are not armed. Their training, including security matters, consists of being instructed to read the Employer's handbook and riding for a day or two with another courier-guard or dispatcher along the route they will be assigned in order to learn the route and how to pick up and deliver. Branch Manager Fleming testified that he "understands" that the Employer makes a criminal background investigation of each new employee, although the former Operations Supervisor testified that such investigations were not made. Branch Manager Fleming has stopped the practice of putting on employee to work on the day on which he applies for employment, a common practice in the past due to the high turnover among courier-guards.

The Employer's handbook places the responsibility on courier-guards "for the security of not only the items being picked up and delivered, but also the customer's building" when courier-guards are on the premises "during nonworking hours." There is no evidence that would tend to show that once a courier-guard has gained access to a customer's building, either during or after the customer's business hours, the courier-guard has any job function other

than to pick up and deliver materials. They are not to enter a customer's premises if it is found to be unlocked, but rather contact their dispatcher or the police; also, they are not to permit strangers to enter with them after hours. Both the Employer's handbook and the testimony of witnesses is that courier-guards are not to use force to protect a customer's property. In addition, the handbook pointedly instructs courier-guards "not to use physical force unless absolutely necessary to protect your life or the life of another."

The Board has considered the Section 9(b)(3) guard status of unarmed couriers in several cases over the years. Those cases are reviewed in *Purolator Courier Corp.*, 300 NLRB No. 103 (1990). There the Board states that the issue in such cases is "whether the basic duties of the . . . courier-guards focus on the *protection* of customer property. . . . " Slip opinion at page 8-9. To be a statutory guard, an employee must engage in the protection of customer property "directly and substantially." Slip opinion at pages 8 and 9.

Based on the record in this case, I find that the Employer's courier-guards are not guards within the meaning of Section 9(b)(3) because their basic function does not involve, directly and substantially, the protection of customers' property. In making this finding, I rely particularly on the following:

First: Training in security matters is minimal. It appears that the new Branch Manager discusses security aspects of the job with applicants for employment, but there is no evidence to show that they or currently-employed courier-guards undergo any specific training in protective measures other than being instructed to read the Employer's handbook.

Second: Materials are transported in unsecured containers and in vehicles which are sometimes left unlocked and unattended with the engine running.

Third: The record does not show how pickups are made during customers' business hours and whether any special procedures are followed to safeguard materials during the time they are being placed in the custody of courier-guards. Some after-hours pickups are made from unsecured areas and any items delivered at the same time would, presumably, be left in the same unsecured place. While some banks require keys and codes for access after hours, there is no basis on which to judge whether a substantial number place their materials in an area to which access is not restricted. The significance of open and unsecured areas is that their use by a customer negates any responsibility placed on courier-guards to protect the customer's premises. Likewise, the Employer's instructions to courier-guards not to enter a customer's premises found to be open after hours negates any direct responsibility to protect the property, since the courier-guard thereby avoids confrontation with unauthorized persons and avoids taking custody of a customer's materials. The reporting by the courier-guard that the premises are open may accelerate a response by police, and in this sense be regarded as "protecting" a customer's property, but in no more significant respect than a like report by any good citizen. Moreover, the instruction that courier-guards are not to permit strangers to enter a customer's premises with them after hours is a procedure incidental to the courier-guards' pickup and delivery function, since a courier-guard has no discretion to determine who should or should not enter the premises, and thus is not employed for the purpose of controlling access to customers' premises. Finally, the Employer's instructions regarding the

use of physical force by unarmed courier-guards indicates that their security functions are subordinate to the transportation of customers' property.

It appears that the primary duties of courier-guards are the pickup, transport and delivery of customers' materials. The security measures actually carried out by courier-guards appear to be ordinary, common-sense measures, and are not characteristic of true guard status.

Since courier-guards are not statutory guards, the Petitioner is not barred from being certified as their representative. I will, therefore, direct an election in a unit of courier-guards.

In defining that unit, the Petitioner specifically urges the inclusion of dispatchers, while the Employer urges their exclusion as statutory supervisors. There are two dispatchers at the New Brighton Branch, one on the first work shift from 6:00 a.m. to 2:00 p.m. and the other on the next or second work shift from 2:00 p.m. to 10:00 p.m. The record does not clearly show the number of courier-guards on each of these shifts, but indications in the record point to there being a combined total of about 25 employees, a large number of whom work on the 6:00 a.m. shift.

Dispatchers are paid a starting yearly salary of $15,800, while rank-and-file courier-guards, line haul drivers and lead couriers, are paid an hourly wage rate of between $5.00 and $6.00; courier-guards who drive their own vehicles, which are leased to the employer, are paid $25.00 per hour. The record does not clearly show whether courier-guards and dispatchers have the same fringe benefits. At the outset of their shifts, dispatchers assist courier-guards in unloading and sorting incoming items at the Branch and loading them onto the proper vehicles for delivery. While courier-guards are driving their routes,

dispatchers work in the dispatch office. Much of their time is spent dealing with customers and courier-guards by telephone and tracking items which customers complain were not delivered and tracking items which courier-guards indicate are missing from their loads.

Branch Manager Fleming described dispatchers' responsibilities. They include the issuance of timecards, keys and gas credit cards to courier-guards at the beginning of a shift, as well as making sure the courier-guards inspect their vehicles. At the end of a shift courier-guards turn in delivery documents to the dispatcher along with their keys and credit cards; the dispatcher checks the delivery documents to see that they are completed properly and makes sure the courier-guards punch out from work on the time clock and leave the Branch facility.

Branch Manager Fleming testified that around the time he began employment, dispatchers Belford and Vallis interviewed applicants and recommended some be hired. Belford explained in his testimony that normally dispatchers have no responsibility for hiring employees, but that he was instructed by Operations Supervisor Starkey to hire employees and put them to work as fast as possible because the Employer was short-handed. As a result, about ten employees were hired during a two-month period which roughly coincided with the time Fleming's predecessor was discharged (at the end of November 1990), through the time Fleming began employment (in mid-December) and through the time the Operations Supervisor resigned (at the end of December).

In regard to authority to grant time off from work, Fleming testified that the Operations supervisor usually grants such requests as long as the dispatcher

has "recommended" or "made suggestions" regarding replacing an absent courier-guard. The record shows that it is the responsibility of lead couriers to fill in for absent courier-guards and, additionally, that dispatchers sometimes fill in, and that a mechanic on first shift is always willing to replace an absent courier-guard.

Branch Manager Fleming testified regarding three instances of discipline of courier-guards involving Belford and four instances involving Vallis. Belford testified that dispatchers have no authority to discipline, and in the three instances of discipline involving him, the decision to discipline was made by Fleming, who instructed him to sign the disciplinary paperwork and communicate the result to the affected courier-guard. Fleming testified that in one of the three instances Belford told him the facts, but Fleming decided on the discipline and "requested" Belford to communicate it to the courier-guard. In a second instance Fleming testified that he instructed Belford to follow the Employer's policy, which requires a suspension for a second driving offense, and that Belford did so. In the third instance Fleming testified that Belford "recommended that [a courier-guard's forgetting to load items on his truck and taking too long to make deliveries] was a problem and that we should address it." After discussion, Fleming and Belford agreed that a verbal warning should be given and Belford was instructed to make a written record of the discipline and give it to the employee.

Fleming had no first-hand knowledge regarding the four instances of discipline involving dispatcher Vallis, since each of them occurred before he was hired. Evidence of these instances consists of four written discipline action records signed by Vallis.

Fleming testified that dispatchers make recommendations regarding probationary courier-guards and that their "conclusion" determines whether the courier-guard obtains permanent employee status. Fleming's testimony, however, makes clear that a dispatcher's failure to "mention" anything negative about a probationary employee is regarded as a "recommendation" for permanent employment and that anything negative said by a dispatcher about a probationary employee is regarded as a recommendation against permanent employee status.

Fleming also testified that dispatchers can recommend the transfer of a courier-guard from one route to another for the purpose of cross-training.

The record shows that dispatchers have important responsibilities in carrying out the Branch's operations in an efficient manner and that the Employer relies on them in a variety of circumstances to deal directly with courier-guards who work on their shifts. However, in carrying out those responsibilities, the dispatchers do not possess any supervisory authority delineated in Section 2(11) of the Act. Thus, they do not have the authority to hire employees. The instances of hiring by dispatcher Belford shown by the testimony was pursuant to a specific instruction by the Operations Supervisor, necessitated by a particular problem and exercised in a limited time period. In point of fact, Belford was designated as the Employer's agent for hiring in one special circumstance and had neither possessed nor exercised hiring authority previously. There is no evidence that, following that special circumstance, dispatchers possess the authority to hire employees.

Regarding authority to discipline and grant time off, the record shown that dispatchers do not make recommendations, but rather have a reporting function

and that their superiors decide those personnel matters. In the first and second instances of discipline related above, Belford did not recommend discipline; and in the third instance, his "recommendation" that the problem be addressed is not a recommendation that discipline be imposed, but that the problem be dealt with in a manner to be determined by the Branch Manager.

The record does not show whether dispatchers have ever been informed that they are to evaluate probationary courier-guards. Clearly the Employer does not solicit recommendations from its dispatchers regarding them. The Employer's policy of regarding its dispatchers' negative comments or failure to make negative comments as "recommendations" cannot convert the dispatchers' actions and inactions into "recommendations" within the meaning of Section 2(11).

The transfer of employees for cross-training purposes is not supervisory in nature. Since courier-guards are assigned permanent routes any such "transfer" would be a temporary arrangement. Moreover, the record fails to show the duration of such "transfers," whether for one day or more, or how frequently a particular courier-guard is transferred for that purpose.

The Employer argues in its post-hearing Brief that an abnormally high ratio of employees to supervisors will result unless dispatchers are found to be statutory supervisors. It points out that its two admitted supervisors, the Branch Manager and the Operations Supervisor, will be deemed to supervise more than 35 employees each. Normally a high ratio of employees to supervisors is a factor favoring a finding of the existence of supervisory status. But in this case the Employer's argument is not persuasive

because the record shows that the Operations Supervisor is the supervisor in fact of all the courier-guards who work in outlying areas of whom there are over 40. Thus, the Employer conducts its operations with a high ratio of employees to supervisors.

In these circumstances, and for the above reasons, I shall include the dispatchers in the bargaining unit herein. *Feralloy West Co.*, 277 NLRB 1083 (1985); *Bowne of Houston*, 280 NLRB 1222 (1986).

There is no evidence that the lead courier on the third shift exercises any authority delineated in Section 2(11) of the Act. The record shows that the five courier-guards on the third shift have permanently-assigned routes. At the beginning of their routes the lead courier issues them keys and credit cards like the dispatchers on the first and second shifts. During third shift, the lead courier performs paperwork consisting of separating billings, filing gas slips and route sheets, and working on IBM "log reports." He also answers the telephone and is instructed to report to the Branch Manager if "anything arises." The lead courier is under instruction to report infractions to the Branch Manager. He has no authority to grant time off from work to courier-guards, and he does not assign routes to them. In these circumstances, I find that the third shift lead courier does not possess or exercise any authority described in Section 2(11) of the Act, and is not a supervisor within the meaning of that section of the Act.

In essence, the Petitioner seeks a branch-wide unit of courier-guards. Neither party contends that the courier-guards who drive in outlying areas do not have a community of interest with the courier-guards who drive from the Branch facility itself; nor does either party contend that courier-guards who use their own

vehicles in their work pursuant to a lease arrangement with the Employer are not employees within the meaning of Section 2(3) of the Act. Accordingly, I find a unit to be appropriate consisting of all full-time and regular part-time courier-guards employed by the Employer's Branch located at New Brighton, Minnesota, including line haul drivers, lead couriers and dispatchers. Since there is no classification of "relief driver" which the Petitioner would include in its description of the unit it believes to be appropriate, I have omitted this classification from the description of the unit I find to be appropriate. Excluded from the unit are the customary classifications of office clerical employees, managerial employees, professional employees, guards and supervisors as defined in the Act.

SDO

306 NLRB No. 22

D--2522
New Brighton, MN

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

PONY EXPRESS COURIER CORP.

and

Case 18--CA--11940

TEAMSTERS LOCAL UNION
NO. 120,
INTERNATIONAL
BROTHERHOOD OF
TEAMSTERS, AFL--CIO

DECISION AND ORDER

On October 29, 1991, the General Counsel of the National Labor Relations Board issued a complaint alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Cases 18--RC--15020. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed its answer admitting in part and denying in part the allegations in the complaint.

On November 29, 1991, the General Counsel filed a Motion for Summary Judgment. On December 6, 1991, the Board issued an order transferring the proceeding to the

Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer the Respondent admits its refusal to bargain, but attacks the validity of the certification on the basis of the Board's unit determination in the representation proceeding.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

Findings of Fact

I. Jurisdiction

The Respondent, Pony Express Courier Corp., is a Delaware corporation, with an office and place of business in New Brighton, Minnesota, where it is in the

business of transporting commodities and other items of value. Annually it purchases and receives products, goods, and materials valued in excess of $50,000 directly from points outside the State of Minnesota.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. The Certification

Following the election held July 19, 1991, the Union was certified on July 26, 1991, as the collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time courier-guards employed by its Breach operation located at New Brighton, Minnesota, including line haul drivers, lead couriers and dispatchers; excluding office clerical employees, managerial employees, professional employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

Since September 17, 1991, the Union has requested the Respondent to bargain and, since September 17, 1991, the Respondent has refused. We find that this refusal

constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

Conclusions of Law

By refusing on and after September 17, 1991, to bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 360 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Pony Express Courier Corp., New Brighton,

Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Teamsters Local Union No. 120, International Brotherhood of Teamsters, AFL--CIO, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time courier-guards employed by its Branch operation located at New Brighton, Minnesota, including line haul drivers, lead couriers and dispatchers; excluding office clerical employees, managerial employees, professional employees, guards and supervisors as defined in the Act.

(b) Post at its facility in New Brighton, Minnesota, copies of the attached notice marked "Appendix."[1]

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[1] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading

Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. January 21, 1992

James M. Stephens, Chairman

Dennis M. Devaney, Member

Clifford R. Oviatt, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

"POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

Supreme Court, U.S.
1993
CLERK

No. 92-1485

In the Supreme Court of the United States

OCTOBER TERM, 1992

PONY EXPRESS COURIER CORP., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board correctly held that petitioner's "courier-guards" are not "guards" within the meaning of Section 9(b)(3) of the National Labor Relations Act.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A18) is reported at 981 F.2d 358. The decision and order of the National Labor Relations Board (Board) in the unfair labor practice proceeding (Pet. App. A38-A43) is reported at 306 N.L.R.B. No. 22. The Board's decision and direction of election in the underlying representation proceeding (Pet. App. A21-A37) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1992. The petition for a writ of certiorari was filed on March 10, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operates a package delivery service in New Brighton, Minnesota. Pet. App. A25. Petitioner employs drivers, whom it classifies as "courier-guards," to transport goods to and from its customers. Courier-guards transport a variety of items for banks and businesses, including food stamps, payroll checks, bank checks in the collection process, and medical supplies, but neither cash nor jewelry. *Id.* at A26. A courier-guard is uniformed, unarmed, and normally unaccompanied when driving his or her route. *Id.* at A26, A28. Courier-guards receive minimal security training: they do not undergo any specific training in protective measures other than being instructed to read petitioner's employee handbook. *Id.* at A29.

Although the employee handbook states that delivery vehicle doors "must be kept locked at all times," in practice, courier-guards rarely lock their vehicles during brief stops, and sometimes leave them unattended with the engine running. Pet. App. A26-A27, A30. Some delivery vehicles do not have locks. *Id.* at A27. Courier-guards do not lock their vehicles while they are working inside them. *Ibid.* Materials picked up from and delivered to various banking customers, including the Federal Reserve Bank in Minneapolis, are transported by the courierguards in unlocked containers. *Id.* at A27, A30.

More than half of all pickups are made by courier-guards after the close of the customer's business day. Pet. App. A27. Some after-hours pickups are made from unsecured areas of the customer's premises. *Id.* at A30. International Business Machines Corp.

(IBM), one of petitioner's largest customers, requires the use of an access code for entry to some of its facilities; generally, IBM leaves its packages in a foyer for pickup. *Id.* at A28. At one IBM facility, packages are left in a hallway accessible from the outside through an unlocked door. *Ibid.* At another of its facilities, IBM changed the access code without notifying petitioner, and simply left its packages for pickup on a stoop. *Ibid.* Courier-guards use keys or key-cards to make pickups and deliveries at about 32 of petitioner's more than 300 banking customers, but it is unclear how many of these transactions occur after business hours and (except in three instances) what area of the customer's premises the key or key-card unlocks. *Id.* at A27-A28.

Petitioner's employee handbook places responsibility on its courier-guards "for the security of not only the items being picked up and delivered, but also the customer's building" when they are on the customer's premises "during nonworking hours." Pet. App. A28. Courier-guards are instructed, however, not to enter a customer's building if they discover it is unlocked when it should be locked; rather, they notify their dispatcher or the police. *Id.* at A29. The employee handbook also states that courier-guards are not to use force to protect customer property; they are allowed to use physical force only if "absolutely necessary to protect your life or the life of another." *Ibid.*

2. On May 1, 1991, Teamsters Local 120, International Brotherhood of Teamsters, AFL-CIO (Union), filed a petition with the Board for a representation election in a unit consisting of drivers and dispatch-

ers employed by petitioner at its New Brighton operation. Pet. App. A7. Petitioner contended that no question concerning representation existed, since its courier-guards are "guards" within the meaning of Section 9(b)(3) of the National Labor Relations Act (Act), 29 U.S.C. 159(b)(3), and thus cannot be represented by a labor organization which, like the Union, admits non-guard employees to membership. Pet. App. A25.[1]

On June 7, 1991, the Board's Regional Director, following a hearing, ruled that petitioner's courier-guards are not "guards" within the meaning of Section 9(b)(3). Pet. App. A29. The Regional Director observed that, under the Board's decision in *Purolator Courier Corp.*, 300 N.L.R.B. 812 (1990) (*Purolator IV*),[2] in order for a "courier-guard" to be a

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[1] Section 9(b)(3) provides:

> The Board shall decide in each case whether * * * the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not * * * decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a unit of guards if such organization admits to membership * * * employees other than guards.

[2] The Board had considered the Section 9(b)(3) status of Purolator Courier Corp.'s courier-guards in three prior cases. See *Purolator Courier Corp.*, 266 N.L.R.B. 384 (1983) (*Purolator III*), enforced *sub nom. Local 851, International Bhd. of Teamsters* v. *NLRB*, 732 F.2d 43 (2d Cir. 1984) (per

statutory guard, that employee's basic job function must involve, directly and substantially, the protection of valuable property of the employer's customers. Pet. App. A29. Applying that test, the Regional Director held: "[T]he primary duties of [petitioner's] courier-guards are the pickup, transport and delivery of customers' materials. The security measures actually carried out by courier-guards appear to be ordinary, common-sense measures, and are not characteristic of true guard status." *Id.* at A31.

In so holding, the Regional Director found "no evidence that would tend to show that once a courier-guard has gained access to a customer's building, either during or after the customer's business hours, the courier-guard has any job function other than to pick up and deliver materials." Pet. App. A28-A29. The Regional Director noted that petitioner's courier-guards receive minimal security training, use unsecured containers for transporting customer property, and leave their delivery vehicles unlocked and unattended with the engine running. *Id.* at A29-A30. The Regional Director also determined that the company rule restricting the use of physical force by courier-guards was an indication that "their security functions are subordinate to the transportation of customers' property." *Id.* at A30-A31.

Further, the Regional Director found that petitioner's rule prohibiting courier-guards from entering unlocked buildings, at times when the buildings should be locked, negated responsibility for protect-

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curiam); *Purolator Courier Corp.*, 265 N.L.R.B. 659 (1982) (*Purolator II*); *Purolator Courier Corp.*, 254 N.L.R.B. 599 (1981) (*Purolator I*).

ing customer property, since the courier-guard "thereby avoids confrontation with unauthorized persons and avoids taking custody of a customer's materials." Pet. App. A30. To alert the police in that eventuality, the Regional Director concluded, is no more indicative of responsibility for protecting customer property than "a like report by any good citizen." *Ibid.*[3]

Accordingly, the Regional Director directed an election in a unit consisting of all courier-guards and dispatchers employed by petitioner at its New Brighton operation. Pet. App. A22. The Board denied petitioner's request for review of the Regional Director's decision, finding that it raised no substantial issue warranting review. *Id.* at A7. In July 1991, the Union won the election and was certified as the collective bargaining representative of the employees in the unit. *Ibid.*

Petitioner thereafter refused to bargain. In October 1991, the Union filed an unfair labor practice charge against petitioner, and the Board's General Counsel issued a complaint. Pet. App. A7-A8, A38. Finding that all issues relevant to the unfair labor practice charge were, or could have been, litigated in the representation proceeding, the Board granted

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[3] Petitioner also has a rule prohibiting courier-guards from permitting strangers to enter a customer's building with them after hours. Pet. App. A29. The Regional Director found that rule "incidental to the courier-guards' pickup and delivery function." *Id.* at A30. "[S]ince a courier-guard has no discretion to determine who should or should not enter the premises," the Regional Director concluded, he or she "is not employed for the purpose of controlling access to customers' premises." *Ibid.*

summary judgment decreeing that petitioner had violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), and ordered petitioner to bargain upon request with the Union. Pet. App. A38-A43.[4]

3. The court of appeals enforced the Board's order. Pet. App. A18. Citing this Court's decision in *Allied Chemical & Alkali Workers, Local Union No. 1* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), as well as its own precedents, the court of appeals observed that "[t]he Board has broad discretion in certifying an appropriate bargaining unit because of its expertise in this area." Pet. App. A9. The court then held that substantial evidence supported the Board's conclusion that petitioner's courier-guards are not "guards" within the meaning of Section 9(b)(3), as construed by the Board in *Purolator IV*.[5] Pet. App. A10-A13.

The court of appeals found that the precautions petitioner's courier-guards follow when making after-hours pickups and deliveries at a customer's premises are "common-sense measures which could be characteristic of any driver employed by a pickup and delivery service." Pet. App. A12. Agreeing with the Board, the court concluded that those precautions "do

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[4] In the representation proceeding, petitioner sought the exclusion of its dispatchers from the bargaining unit on the ground that they are supervisors within the meaning of Section 2(11) of the Act, 29 U.S.C. 152(11). The Regional Director found that the dispatchers are not statutory supervisors. Pet. App. A31-A36. The court of appeals affirmed that ruling as supported by substantial evidence, *id.* at A18, and petitioner does not seek further review of the issue.

[5] The court refers to this decision as "*Purolator II*". In fact, it is *Purolator IV* (see note 2, *supra*).

not require the level of protection to customer property that would afford [the courier-guards] true guard status under the Act." *Id.* at A11-A12. The court noted that the security training received by the courier-guards is limited to instructions contained in the employee handbook "and what little direction is given by the Branch Manager in employee interviews." *Id.* at A12. The court also observed that, "either by choice or impossibility," some of the courier-guards do not lock their vehicles when making deliveries. *Ibid.* Accordingly, on the facts presented, the court found that petitioner's courier-guards are not engaged directly and substantially in the protection of customer property. *Id.* at A13.[6]

The court of appeals also considered petitioner's contention that the Board's *Purolator IV* standard is a departure from prior Board precedent and is inconsistent with the purpose and policy of Section 9(b)(3). Pet. App. A13-A14. The court observed that the Board is empowered to modify its construction of the Act "if such change is consistent with the legislative purpose and is reasonable." *Id.* at A13. The court assumed *arguendo* that *Purolator IV* represented a departure from "past practice," but held

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[6] In addition, the court of appeals found that petitioner had circulated a memorandum to its branch managers, which instructed them to insist that employees refer to its drivers as "courier-guards" for the purpose of preserving their guard status under the Act. Pet. App. A13. The court stated that "[m]erely bestowing a particular label upon the drivers neither expands their function nor magically transforms them into statutory guards under the Act, because we look to duties, not job titles." *Ibid.*

that standard to be a reasonable construction of Section 9(b)(3). Pet. App. A14.

ARGUMENT

1. Petitioner contends (Pet. 14-16) that, prior to *Purolator IV*, the Board had established a general policy that the driver-employees of a courier service are "guards" within the meaning of Section 9(b)(3). Petitioner asserts (Pet. 25-29) that *Purolator IV* represents a departure from that policy and is contrary to the history and purpose of Section 9(b)(3). That claim is jurisdictionally barred, and, in any event, does not warrant this Court's review.

a. In the court of appeals, petitioner argued that the Board's *Purolator IV* test departs from prior precedent and conflicts with the purpose of Section 9(b)(3). That claim was not raised before the Board, however. Rather than challenge the *Purolator IV* test, petitioner argued before the Board that *Purolator IV* was factually distinguishable from this case, because the duties of its courier-guards differed from those of the courier-guards at issue in *Purolator IV*.[7]

Section 10(e) of the Act, 29 U.S.C. 160(e), provides that, absent extraordinary circumstances, "[n]o objection that has not been urged before the Board * * * shall be considered by the court." Because petitioner has shown no "extraordinary circumstances" justifying its failure to raise its legal challenge to the

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[7] See Pet. Request for Review at 12-14; Pet. Response to General Counsel's Motion for Summary Judgment at 3-4. Petitioner also sought to analogize the functions of its courier-guards to employees found in other cases to be statutory guards.

Purolator IV test before the Board, petitioner is jurisdictionally barred from asserting it before this Court. *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982); *International Ladies' Garment Workers' Union* v. *Quality Manufacturing Co.*, 420 U.S. 276, 281 n.3 (1975).

b. Even if petitioner's challenge to *Purolator IV* were properly presented, that claim fails. The test does not represent a basic change in Board policy with respect to the status of courier-guards under Section 9(b)(3), but simply refines that policy. Moreover, whether or not *Purolator IV* reflects a change in policy, the court of appeals correctly concluded that it is a reasonable interpretation of Section 9(b)(3).

(i) Congress enacted Section 9(b)(3) because it was concerned with the possibility that, if guards were included in production units, their loyalty to fellow union members might conflict with their duty to report to their employer derelictions of duty or violations of rules by those employees. *Walterboro Manufacturing Corp.*, 106 N.L.R.B. 1383, 1384-1385 (1953). The Board has recognized that the duties of courier-guards may implicate that concern, because "[i]f a substantial function of the courier-guards is to protect customers' property, that function would of necessity include the protection of that property against all others and thus meet the 9(b)(3) requirement of enforcing against employees and other persons rules for the protection of such property." *Purolator IV*, 300 N.L.R.B. at 814 n.7.

In determining whether a "courier" is a statutory guard, the Board has long recognized the distinction

between the *protection* of property and the *delivery* of property. Thus, in *Interstate Co.*, 125 N.L.R.B. 101 (1959), the Board held that a courier, whose duties included picking up money from various restaurants operated by his employer and delivering it to a central facility for deposit in a bank, was not a statutory guard because he was employed "not to guard the money of the [e]mployer but rather to transport it from place to place." *Id.* at 106. The Board made the same distinction in cases involving the transportation of property belonging to a third party rather than to the courier-guards' employer. See *Brink's Inc.*, 226 N.L.R.B. 1182, 1183 (1976) (relevant inquiry is "whether the couriers here protect property of the [e]mployer's customers").

In several later decisions, the Board's finding of statutory guard status gave significant weight to the fact that the couriers were responsible, as in *Brink's Inc.*, for making pickups and deliveries on customers' premises after business hours.[8] Nevertheless, in *Purolator III* the Board reiterated that the ultimate issue is whether "the basic function of these courier-guards involves, directly and substantially, the protection of valuable property of the [e]mployer's

[8] See *Purolator I*, 254 N.L.R.B. at 599-600 (substantial number of pickups and deliveries made during non-business hours; couriers issued keys required for entering premises, opening security vaults, and disengaging alarm systems); *Purolator II*, 265 N.L.R.B. at 660-661 (ninety percent of drivers required to use keys to open customer security vaults; ninety-five percent of drivers use keys to enter customer premises during non-business hours). See also *MDS Courier Service, Inc.*, 248 N.L.R.B. 1320, 1320-1321 (1980).

customers," 266 N.L.R.B. at 385 (citing *Purolator I* and *Purolator II*).

In *Purolator IV*, the Board reexamined the standards used to determine the status of courier-guards under the Act, in light of the substantial growth and change that had occurred in the guard and courier industries since the enactment of Section 9(b)(3) in 1947. 300 N.L.R.B. at 815 n.11. After such reexamination, the Board reaffirmed its longstanding view that the determinative issue with respect to the status of courier-service employees under Section 9(b)(3) is "whether [their] basic duties * * * focus on the *protection* of customer property" or, instead, whether they "essentially function not as guards but as delivery drivers for the [e]mployer's customers." 300 N.L.R.B. at 814 (emphasis in original). The Board acknowledged that, in some previous decisions, it had "placed great weight on whether the courier-guards had access to customer premises rather than analyzing the entire range of actual employee duties." *Id.* at 815 n.9. It concluded that it is more appropriate to treat "access to customer property as one factor among others in determining guard status," rather than as a "bright-line" test of guard status. *Id.* at 815 n.11.

In sum, contrary to petitioner's contention (Pet. 28-29), the ultimate test that the Board applied in *Purolator IV*—*i.e.*, whether the basic function of the courier-guards involves the protection of valuable property of the employer's customers—is the same test that was applied in *Purolator III*, and is drawn from principles enunciated in other earlier courier-guard cases. *Purolator IV* modified the Board's

approach only to the extent of abandoning the practice reflected in some of the prior cases of giving controlling weight to the factor of access to customer property.

(ii) Even if the *Purolator IV* test were deemed a revision of Board policy, the Board has the authority to modify its construction of the Act. *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 265-266 (1975). The issue for the courts is whether the Board's approach is rational and consistent with the Act. *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786-787 (1990). The court of appeals correctly concluded that, even assuming that a departure from past practice exists, "the Board's construction of the Act as set forth in *Purolator* [*IV*], mandating a case-by-case approach utilizing a variety of factors in determining the status of a guard under the Act, is certainly reasonable, if not preferred." Pet. App. A14.

Petitioner asserts (Pet. 22-23, 28-29) that, by requiring "direct and substantial" involvement in the protection of customer property, the Board's *Purolator IV* standard embraces an unduly narrow "quantitative" test of guard status that is inconsistent with the Act. The "direct and substantial" involvement aspect of the *Purolator IV* test, however, is not a requirement that courier-guards must spend any particular percentage of their work time performing guard duties.[9] Rather, the *Purolator IV* test is

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[9] The Board has rejected such a rule. See *Walterboro Manufacturing Corp.*, 106 N.L.R.B. 1383, 1384-1385 (1953) (watchmen, who were responsible for making plant rounds, punching time clocks at regular intervals, and reporting infractions of company rules, were statutory guards even though they spent

designed to address the question whether a given unit of courier-guards in fact has been vested by the employer with statutory guard duties. If a courier-guard's range of duties includes true property-protection duties, that employee is a statutory guard, whether he or she actually spends a substantial percentage of time performing those (as compared to other non-guard) duties.[10]

Nor is petitioner correct in arguing (Pet. 23-24, 29) that the requirement of "direct and substantial" involvement in protection of property would exclude from statutory guard status employees such as armed guards employed by an armored delivery service who are also responsible for driving their vehicles. As the Board pointed out in *Purolator IV*, armored vehicle drivers are statutory guards because they "are obviously employed to protect property within the meaning of [Section 9(b)(3)]." 300 N.L.R.B at 814 (quoting *Armored Motor Service Co.*, 106 N.L.R.B. 1139, 1140 (1953)). Thus, such an employee is a statutory guard because his or her basic duties "focus

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75 percent of their time at maintenance work, and only 25 percent of their time performing guard duties).

[10] Petitioner incorrectly suggests (Pet. 26-27) that, in decisions prior to *Purolator IV*, the Board and the courts have found various kinds of employees to be Section 9(b)(3) guards without regard to the extent to which their job duties involve the protection of property. In each of the cases cited by petitioner, the employees were held to be statutory guards because their basic duties included significant responsibility for protecting the employer's (or its customers') property or premises.

on the protection of customer property." *Purolator IV*, 300 N.L.R.B. at 814 (emphasis omitted).[11]

2. Petitioner contends (Pet. 17) that the court of appeals' decision conflicts with *Local 851, International Bhd. of Teamsters* v. *NLRB*, 732 F.2d 43 (2d Cir. 1984) (per curiam). That contention is without merit; the job duties of the courier-guards found to be statutory guards in *Local 851* differ significantly from those of petitioner's employees.

In *Local 851*, the Board found that the courier-guards before it were statutory guards because "[their] basic function * * * involves, directly and substantially, the protection of valuable property of the [e]mployer's customers." *Purolator III*, 266 N.L.R.B at 385. The courier-guards were entrusted with a wide variety of valuable commodities; were bonded and subjected to security clearance; were given keys to obtain access to the premises and security vaults of a substantial number of customers; and were held accountable for the safekeeping of packages in their vehicles and for taking precautions when entering or leaving customers' locked premises. *Id.* at 384-385. The Second Circuit affirmed the Board's finding as supported by substantial evidence. 732 F.2d at 44.

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[11] Petitioner briefly contends (Pet. 29-30) that, assuming that *Purolator IV* states the proper inquiry under Section 9(b)(3), the Board and the court of appeals misapplied that test in holding that its courier-guards are not "guards" within the meaning of that Section. Petitioner's fact-bound disagreement with the court of appeals' application of the substantial evidence test does not warrant this Court's review. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

Here, petitioner's courier-guards, like those in *Local 851*, are entrusted with a variety of valuable goods, Pet. App. A26, but the similarity in their respective duties ends there. Although petitioner has a policy of conducting criminal background investigations of new employees, the court of appeals found that "there is some question whether this has been done in practice" at New Brighton. *Id.* at A4. Moreover, the record in this case demonstrates that petitioner's courier-guards are not given keys to access a substantial number of customers' premises. As the Regional Director noted, petitioner's own evidence indicated that keys or key-cards were required for access to only about ten percent of petitioner's commercial banking customers. *Id.* at A27.

Further, the record does not demonstrate that petitioner's courier-guards have access to customers' security vaults. Neither the Board nor the court made such a finding, and petitioner's own evidence showed that a "box key" was used at only two of its more than 300 commercial banking customers. Pet. App. A27-A28. Nor does petitioner hold its courier-guards responsible for safekeeping of packages in their vehicles. As the Regional Director found, petitioner's courier-guards generally disregard the company rule requiring them to keep their delivery vehicles locked at all times, *id.* at A27, and there was no finding below that petitioner actually enforces that rule or punishes violators.[12] Finally, the court of

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[12] As the court of appeals noted, the storage compartment of many employee-owned delivery vehicles cannot be locked, and

appeals found that the cautionary procedures followed by the courier-guards when making pickups and deliveries after business hours are measures "characteristic of any driver employed by a pickup and delivery service." *Id.* at A12. Accordingly, there is no reason to doubt that the Second Circuit would decide this case as did the court below and uphold the Board's decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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some company-owned delivery vehicles are not equipped with locks. Pet. App. A3.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PONY EXPRESS COURIER CORP.,

Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

AMICUS CURIAE BRIEF FOR SECURITY COMPANIES ORGANIZED FOR LEGISLATIVE ACTION IN SUPPORT

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QUESTIONS PRESENTED

(1) Do the decisions of the Eighth Circuit and the National Labor Relations Board conflict with the purpose and policy of Section 9(b)(3) of the National Labor Relations Act of avoiding divided loyalty, causing the decision below to be appropriate for review by the Supreme Court.

(2) Did the Eighth Circuit and the National Labor Relations Board fail to set out a basis for the departure from the previous legal standard used to determine employee status under Section 9(b)(3), causing the decision below to be appropriate for review by the Supreme Court.

(3) Does the decision of the Eighth Circuit set out a legal standard for determining an employee's status as a guard within the meaning of Section 9(b)(3) which is in conflict with the decision of the Second Circuit in *Teamsters Local 851 v. NLRB (Purolator Courier Corp.)*, 732 F.2d 43 (2d Cir. 1984), thereby causing the decision below to be appropriate for review by the Supreme Court.

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I. OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit ("Eighth Circuit") (Pet. App. A1-A18)[1] is reported at 981 F.2d 358. The decision and order of the National Labor Relations Board ("Board") in the unfair labor practice proceeding (*Id.* at A38-A43) is reported at 306 N.L.R.B. No. 22. The Board's Decision and Direction of Election in the underlying representation proceeding (*Id.* at A21-A37) is unreported.

[1] Hereinafter, Pet. App. ____ shall refer to the applicable page of the Petitioner's Appendix.

II. JURISDICTION

The judgment of the Eighth Circuit was issued on December 10, 1992 (*Id.* at A1-A19). The Petition for a Writ of Certiorari was timely filed on March 10, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

III. STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

§158(a)(5)

> It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees . . .

* * *

§159(b)(3)

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees, other than guards.

IV. INTEREST OF AMICUS

Security Companies Organized For Legislative Action ("S.C.O.L.A.") is an association of employers which provide protection services for their customers, formed for the purpose of

addressing legal and legislative issues affecting the security industry. It is necessary for S.C.O.L.A. to file this *Amicus Curiae* brief because the consistent interpretation of Section 9(b)(3) of the National Labor Relations Act ("Act")[2] in accordance with its purpose and policy is of vital importance to the industry which employs hundreds of thousands of persons who are guards within the analysis applied in the prior decisions of the Board. It is the position of S.C.O.L.A. that the Court of Appeals for the Eighth Circuit and the Board have devised an analysis to determine guard status under Section 9(b)(3) which is in direct conflict with thirty (30) years of decisional authority as well as the purpose and policy of the Act and is an exercise of power by the Board beyond its statutory authority to certify certain collective bargaining units and/or labor organizations. The entire industry, in order to conduct business consistent with the Act with a comfortable degree of predictability, requires the determination of the Supreme Court of the United States to ensure the purpose and policy of the Act is adhered to. If this is accomplished their operations can be conducted and performed as in the past consistent with Section 9(b)(3). This brief is filed upon the consent of both parties.

V. STATEMENT OF THE CASE

On May 1, 1991, a petition for representation was filed by Local No. 120, International Brotherhood of Teamsters, AFL-CIO ("Union") in which the Union sought to represent a bargaining unit consisting of "drivers and dispatchers" working out of the New Brighton, Minnesota facility of Pony Express Courier Corporation ("Pony") (*Id.* at A7). A hearing was held before Region 18 of the Board ("Region") in which Pony contended the employees the Union sought to represent were not "drivers" but "courier-guards", and thus were guards within the meaning of Section 9(b)(3) of the Act, and as these employees were statutory guards, they could not be represented by the Union, because it admits to membership employees other than guards (*Id.*).[3] On

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[2] 29 U.S.C. § 159(b)(3).

[3] The supervisory status of the dispatchers pursuant to Section 2(11) of the Act, 29 U.S.C. § 152(11), was also litigated at the hearing before the Region and in the Eighth Circuit. However, the only issue for which certiorari is sought is the status of the courier-guards under Section 9(b)(3) of the Act.

June 7, 1991, the Region issued a Decision and Direction of Election in which it was found that Pony's courier-guards are not guards within the meaning of Section 9(b)(3) of the Act (*Id.*). Therefore, the Board concluded that it was not prohibited from certifying the Union as the collective bargaining representative of Pony's employees as a matter of law (*Id.*).

On June 20, 1991, Pony filed a timely Request for Review of the Decision and Direction of Election with the Board, which was denied on July 15, 1991 (*Id.*). Subsequently, a secret-ballot election was conducted by the Region in a unit consisting of courier-guards and dispatchers ("Unit") (*Id.*). The Union received a majority of the votes cast in the election, and as a consequence on July 26, 1991, the Union was certified by the Board as the exclusive collective bargaining representative of the courier-guard employees in the Unit (*Id.*).

On October 16, 1991, the Union filed an unfair labor practice charge with the Board alleging that Pony had violated Section 8(a)(1) and (5) of the Act by refusing to bargain with it as the exclusive collective bargaining representative of the employees in the Unit. On October 29, 1991, the Region issued a complaint alleging that Pony had violated Section 8(a)(1) and (5) of the Act (*Id.*). Pony, in its answer, admitted that it had refused to bargain with the Union and pled, as an affirmative defense, the lack of validity of the certification issued by the Board which included other employees with guards as defined in Section 9(b)(3) in the Unit represented by the Union that admits to membership employees other than guards (*Id.*). Thereafter, the Region filed a motion for summary judgment and the Board issued an order transferring the proceedings to itself (*Id.*).

On January 21, 1992, the Board issued its decision granting the motion for summary judgment and found that Pony had violated Section 8(a)(1) and (5) of the Act by refusing to bargain with the Union (*Id.* at A38-A43). Pony sought review of the Board's decision with the Eighth Circuit and the Board filed a cross-application for enforcement of its order (*Id.* at A8).[4]

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[4] Jurisdiction in the Eighth Circuit was based on Section 10(f) of the Act, 29 U.S.C. § 160(f).

On December 10, 1992, the Eighth Circuit issued its decision granting enforcement of the Board's order (*Id.* at A1-A18). The Eighth Circuit held, in denying Pony's petition for review of the Board's order, that the Board's decision that Pony's courier-guards were not guards within the meaning of Section 9(b)(3) of the Act was supported by substantial evidence in the record as a whole (*Id.* at A14). The Eighth Circuit relied heavily on the Board's legal analysis set forth in its prior decision in *Purolator Courier Corp.*, 300 N.L.R.B. 812 (1990) (*Purolator IV*) (*Id.* at A10-A14).[5] The Eighth Circuit also relied on the Board's conclusions that: the security training given to Pony's courier-guards was "minimal", the cautionary measures taken by the courier-guards were simply "common-sense measures" which would be taken by any driver performing pick up and delivery functions, a few customer items were left in unlocked containers by the courier-guards for pick up by customers, and a memorandum was issued to the courier-guards instructing them to use the term "courier-guard" employee when referring to the position they occupied (*Id.* at A10-A14). The Eighth Circuit held that the *Purolator IV* decision had a rational basis and was consistent with the policy of the Act. Relying on this standard the Eighth Circuit determined that the Board's decision below was supported by substantial evidence viewed on the record as a whole (*Id.* at A10-A14).

VI. STATEMENT OF THE FACTS

Pony is engaged nationwide in the business of providing the secured transportation of valuable commodities (*Id.* at A25). The facility at issue is Pony's New Brighton, Minnesota Branch (*Id.*). Pony holds itself out to the public as an organization which provides the secured transportation of commodities (*Id.*). Pony transports a variety of commodities for customers which require

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[5] The Eighth Circuit in its decision incorrectly refers to this case as *Purolator II* (*Id.* at A10-A14). In *Purolator IV*, the Board held that the test to determine if an individual is a guard within the meaning of Section 9(b)(3) is to determine if the employee's job involves "directly and substantially" the protection of valuable property of the customer.

security and protection, such as, cash letters, securities between financial institutions and savings and loan and mortgage companies, medical and laboratory specimens, Drug Enforcement Administration controlled substances, documents, canceled checks and other commodities of value to customers (*Id.* at A26). Included among Pony's customers are the Federal Reserve Bank, commercial banks, savings and loan institutions, drug wholesale distributors, pharmacies and hospitals (*Id.*).

Pony's courier-guards are uniformed and undergo a comprehensive background investigation prior to hire (*Id.* at A28). Each day when the courier-guards report for duty, they are issued their assignments and route keys (*Id.*). Route keys are used to open secured areas at the customer's premises, including otherwise secured doors, offices and safes (*Id.*). Courier-guards are required to keep their vehicles locked at all times under Pony policy as set forth in the Handbook distributed to the courier-guards and on decals placed on Pony's secure vehicles utilized by the courier-guards (*Id.* at A26-A27).[6] Courier-guards utilize the route keys when making deliveries and ensure that the customer's facility is secure after their departure (*Id.* at 27). In addition, courier-guards are provided access to customer computer security codes to be utilized by them in order to gain access to the customer's premises (*Id.* at 28). The courier-guards must reactivate any such alarm system upon their departure (*Id.* at 28).

Pony's courier-guards owe a duty of loyalty to Pony as a consequence of the trust and confidence placed in them, as evidenced by the duties they perform to enforce rules to protect property on behalf of Pony's customers (*Id.* at A28-A29). The courier-guards' duty to enforce rules to protect the property of Pony's customers is codified in the courier-guard Handbook which establishes security rules and directs courier-guards to "Deter, Detect and Report". These words properly symbolize the duty of the courier-guards to enforce rules to protect

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[6] The fact that courier-guards from time to time fail to perform their duties in this regard is merely a matter of employee performance and discipline, which in no way should detract from the essential function of their position.

customer's valuables, which is the fundamental obligation of the employment relationship.

Courier-guards are trained and obligated as employees of Pony to "Deter" theft and vandalism by would-be bandits by exercising preventative means, such as, locking all customer doors and properly reactivating customer alarm systems, wearing their uniforms and badges and adhering to all customer and Pony security procedures (*Id.*).[7] Additionally, courier-guards are required to remain alert to their surroundings at all times in order to "Detect" any problems (*Id.*). Courier-guards are also obligated and directed to ascertain all details relating to any security breach at a customer's location and immediately contact either Pony management or the local police (*Id.*). Further, courier-guards are obligated as a consequence of the employment relationship, to "Report" any suspicious activity and remain on the customer's premises until the police or authorities arrive, whether the incident involves employees of Pony or other individuals (*Id.*). At this point, the courier-guards are obligated to relay all information and assist in the investigation, whether the situation relates to co-employees, employees of the customers or other persons (*Id.*).[8]

Courier-guard training consists of written instructions and on-the-job training given by Pony supervisors or lead courier-guards, which lasts two to four days (*Id.*). The Pony courier-guards are continually informed, from the inception of their employment, that their duty to enforce the rules of Pony and the customer in order to protect the customer's property and premises is an affirmative duty and a fundamental element of

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[7] For example, wearing a uniform is itself a form of security as it reflects the service provided to the customer and informs the public of the secured nature of the transportation. In short, the public clearly perceives a uniform to denote security, as exemplified by the public's perception of uniformed police contrasted to plain clothes police. This is the difference that Pony seeks to portray.

[8] It is this duty to "Report" activity of co-employees and other persons which distinguishes "guards" from employees under Section 9(b)(3). The duty of loyalty towards the employer must override any duty to co-employees or other persons. Congress precluded the Board under Section 9(b)(3) from certifying labor organizations which represented non-guards from also representing guards because the potential for conflict among employees created a divided loyalty dilemma.

their positions (*Id.*). In short, Pony courier-guards, unlike non-guards, are obligated, as a fundamental element of the employment relationship, to enforce against employees of Pony or other individuals, rules to protect the property of Pony and its customers (*Id.*).

VII. ARGUMENT FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

A. The Decision of the Eighth Circuit is in Direct Conflict with the Purpose and Policy of Section 9(b)(3) of the National Labor Relations Act of Avoiding Divided Loyalty and Grants the Board Power Beyond that Authorized under Section 9(b)(3)

While it is true that the Board generally has the authority to interpret the Act, if a decision is made which runs contrary to the language or the purpose and policy of the Act, the reviewing court must exercise its authority to ensure that the purpose and policy of the Act are effectuated.[9] Here, the Board has exceeded the limitations placed on it by certifying a labor organization contrary to the limitations imposed on it by Section 9(b)(3). The Board and the Eighth Circuit have embraced what is euphemistically called the "direct and substantial" test, which is set out in *Purolator IV*, to determine if an employee is a guard within the meaning of Section 9(b)(3) of the Act. This test is in direct conflict with the purpose and policy of Section 9(b)(3) of avoiding collective bargaining units and labor organizations that represent employees employed to enforce rules to protect property, guards, and non-guard employees, which could potentially create a divided loyalty dilemma for the employee called upon to enforce rules against non-guard co-employees who are in the same bargaining unit or labor organization. By applying an analysis to determine guard status which conflicts with the Act, the Board has exceeded its authority and has ignored the policy Congress sought to fulfill when it enacted Section 9(b)(3).

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[9] *NLRB v. Brown*, 380 U.S. 278 (1965).

Section 9(b)(3), in pertinent part, limits the statutory power of the Board from certifying a labor organization from representing a bargaining unit which, "includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises." A situation of divided loyalty can only arise where certain elements of an employment relationship exist between an employer like Pony and an employee employed to enforce rules to protect property of an employer.[10] A situation of divided loyalty, which was proscribed by Section 9(b)(3), is created as the employee responsible for enforcing rules to protect property of an employer or its customer must choose between fulfilling his or her duty of loyalty to his or her employer to enforce rules to protect the property of the employer and its customers and any obligation such an employee would feel toward members of the same labor organization.

The analysis utilized for determining if a situation exists which creates the potential for divided loyalty is not a quantitative analysis which measures the level of security provided by the employer to the customers, as reflected in the newly announced "direct and substantial" involvement test embraced by the Board and the Eighth Circuit. Rather, the historical test, reflected in the Congressional debates on the Taft Hartley Amendment of 1947 and all Board decisions until *Purolator IV*, is an examination of the nature of the employment relationship between the employee and the employee's employer. If a duty to enforce rules to protect the employer's or customer's property or to protect the safety of persons on the employer's or customer's premises exists as an element of the employment relationship, then the employee must be found to be a "guard" within the meaning of Section 9(b)(3).

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[10] *See NLRB v. Brinks, Inc.*, 843 F.2d 448 (11th Cir. 1988); *Truck Drivers Local Union No. 807 v. NLRB*, 755 F.2d 5 (2d Cir.), *cert. denied*, 474 U.S. 901 (1985); *Teamsters Local 851 v. NLRB (Purolator Courier Corp.)*, 732 F.2d 43 (2d Cir. 1984); *International Bhd. of Teamsters, Local 344 v. NLRB*, 568 F.2d 12 (7th Cir. 1978); *Drivers, Local No. 71 v. NLRB*, 553 F.2d 1368 (D.C. Cir. 1977); *Fuchs ex rel. NLRB v. Teamsters Local Union No. 671*, 390 F. Supp. 243 (D. Conn. 1975); *Humphrey v. Drivers, Local 639*, 369 F. Supp. 730 (D. Md. 1974).

It is because of these employment obligations to the employer, as reflected in Section 9(b)(3), that such employees are insulated from being included in bargaining units with non-guard employees and/or being represented by non-guard labor organizations such as the Union.

Herein, to certify the Union as the representative of the Unit is to effectively negate the undisputed obligations of the courier-guard on behalf of Pony and its customers to "Deter, Detect and Report". This would require either that Pony abolish the guard duties which are fundamental to its business and its customers, thereby completely restructuring Pony as a business entity, or that Pony continue to have its employees be called upon to enforce rules to protect the property of Pony or its customers against non-guard employees who would now be fellow members of the same labor organization. It is precisely this situation of divided loyalty that is proscribed by Section 9(b)(3).

Further, the viability and operation of the security industry depends on a consistent determination in accordance with the policy of avoiding the divided loyalty dilemma. If the service envisioned by the security industry, in accordance with the policy of Section 9(b)(3), is to be achieved, a consistent analysis in accordance with the policy of Section 9(b)(3) must be maintained. Since the enactment of Section 9(b)(3) of the Act in 1947, the decisions of the Board, until the decision in *Purolator IV*, correctly reflected the purpose and policy of the Act by inquiring into the fundamental elements of the employment relationship, without unnecessary emphasis on the indicia of the level of security provided by the employee. With regard to the current application of Section 9(b)(3) to courier-guards, the Board and the Eighth Circuit have completely deviated from the clear purpose and policy of Section 9(b)(3) of avoiding situations of divided loyalty, and in essence, have intruded into the province of Congress by legislating courier-guards to be non-guards, when such was rejected by Congress as late as 1986.[11]

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[11] *Redefining of The Term Guard*, Hearing Before the Subcommittee on Labor, S. Hrg. 99-696, 99th Cong. 2d Sess. 87 (April 24, 1986); *See also*, H.R. Rep.

(Footnote continued)

The central purpose and policy of Section 9(b)(3) of avoiding the potential for divided loyalty, by precluding employees who enforce rules to protect an employer's property and/or safety of persons on the employer's premises from being represented by labor organizations which represent non-guard employees, is highlighted by a historical examination of the decisions of the Board and the courts regarding the scope of Section 9(b)(3). An analysis of the caselaw interpreting Section 9(b)(3) clearly demonstrates that the only factor which is relevant to determine an individual's status as a guard under 9(b)(3) is whether a duty exists to enforce rules to protect property as a consequence of the employment relationship. If such a duty exists, an examination into how the duty is effectuated by the employee - firearms - physical force - reporting, is unnecessary, and is in fact contrary to the purpose and policy of Section 9(b)(3).[12] As security levels may change based upon the value of the commodity, the customer's preference, or use of force by bandits, the level of security effectuated by the employee is not the *sine qua non* of guard status. Rather, the determining factor is the obligation of the employee to *enforce rules* to protect property and the resulting divided loyalty dilemma which results if such a duty is present.[13] The Board and the Eighth Circuit have ignored this basic element and have entered into evaluating "security", for

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No. 245, 80th Cong. 1st Sess. 16 (1947); H.R. Rep. No. 3020, 80th Cong. 1st Sess. 992 (12)(b) (1947); H.R. Rep. No. 3904, 94th Cong. 1st Sess. (1975); H.R. Rep. No. 8410, 95th Cong. 1st Sess. 554 (1977); H.R. Rep. No. 2197, 98th Cong. (1983); H.R. Rep. No. 3560, 100th Cong. 1st Sess. (1987); *See* generally 93 Cong. Rec. 6444, 6601, reprinted II NLRB Legislative History of Labor Management Relations Act, 1947 (1948).

[12] The Board's and Eighth Circuit's analysis is fundamentally flawed as it weighs how security is provided (e.g., armed or unarmed), and essentially concludes that in order to be a guard, the employee must "protect the property". Rather, the language of Section 9(b)(3) specifically provides that an employee needs only to "enforce rules to protect property". The Board and the Eighth Circuit have essentially removed "enforce rules" from the language of Section 9(b)(3), and in doing so have ignored thirty (30) years of decisional authority.

[13] *B.P.S. Guard Servs. Inc. v. NLRB*, 942 F.2d 519 (8th Cir. 1991); *McDonnell Aircraft Co. v. NLRB*, 827 F.2d 324, 329 (8th Cir. 1987). *See also NLRB v.*

(Footnote continued)

which they have absolutely no expertise. The caselaw set forth below indicates that it is clear that indicia of the level of security provided does not determine an employee's status as a guard under Section 9(b)(3).

It has been well established that whether an employee is armed or unarmed is irrelevant to an employee's status as a guard under Section 9(b)(3).[14] If a duty to enforce rules to protect the property of an employer or its customers exists, the Board has historically found guard status under Section 9(b)(3). In fact, to draw a distinction as to guard status based on the use of firearms would be patently unreasonable, for an unarmed employee possesses the same duty to enforce rules to protect property of an employer as an armed employee, and the fact that the employee is unarmed while enforcing rules protecting the property only results in a more dangerous duty potentially falling on the employee to fulfill the obligation to enforce rules to protect the property. Indeed, as Pony concluded "Deter, Detect and Report" will accomplish the identical goal of enforcing rules to protect property as effectively as arming its courier-guards. The Board's conclusion in *Purolator IV* is contrary to this principle and thus is in error.[15]

Additionally, it is immaterial that the property being protected belongs to another employer, as the Board has consistently held that individuals are guards who have a duty to enforce rules to protect the property of *other* employers, because an employment

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Brinks, Inc., 843 F.2d at 453 (Judicial decisions have also emphasized that the potential for divided loyalty was the primary concern when Section 9(b)(3) was enacted. The Eleventh Circuit noted that the broad language used by Congress in Section 9(b)(3) encompasses not merely divided loyalties which could occur at a company plant, but also the potential for divided loyalty that could arise whenever a guard is called upon to enforce the rules of his employer against any fellow union member).

[14] *Broadway Hale Stores, Inc.*, 215 N.L.R.B. 46 (1974); *Wackenhut Corp.*, 196 N.L.R.B. 278 (1972); *Crumley Hotel, Inc.*, 134 N.L.R.B. 113, 121 (1961); *Western Electric*, 85 N.L.R.B. 563 (1949), *modified*, 87 N.L.R.B. 183 (1949).

[15] Indeed in a decision subsequent to *Purolator IV*, the Board inconsistently held that guard status would be afforded unarmed employees who make "periodic rounds of the plant, punching security clocks of various stations and opening plant offices and gates with keys." *M.K. Morse Co.*, 302 N.L.R.B. 147 (1991).

relationship existed requiring employees to enforce rules to protect property. For example, in *Burns Electronic Security Services, Inc.*, 256 N.L.R.B. 860 (1981), the Board held that unarmed employees who merely monitored alarms at other employers' premises and reported any activity to the proper authorities were guards within the meaning of Section 9(b)(3), because the unique employment relationship designed to enforce rules to protect property of an employer existed. Moreover, the Board in *MGM Grand Hotel*, 274 N.L.R.B. 139 (1985), held that employees, whose sole responsibility was to stay in a room and monitor fire prevention and alarm systems, were guards within the meaning of Section 9(b)(3), despite the fact that the individuals did not leave the room and simply notified security if a problem arose. The Board so held because the employment relationship created a duty to enforce rules to protect property, as envisioned by Section 9(b)(3).

The amount of time an employee spends performing guard duties is likewise not dispositive in determining whether an individual is a guard within the meaning of Section 9(b)(3). The analysis is not quantitative; so long as a duty exists to enforce rules to protect property, the Board has historically found an employee to be a guard within the meaning of Section 9(b)(3). In *Walterboro Manufacturing Co.*, 106 N.L.R.B. 1383 (1953), the Board held that employees who spent only 25% of their time enforcing rules to protect property, spending the rest of their time performing ordinary maintenance work, were guards within the meaning of Section 9(b)(3). Likewise, in *Raymond Metal Products*, 223 N.L.R.B. 127 (1976), the Board held that clerks who substituted for guards only 25% of their time, were still guards.[16] In the end, the purpose and policy of Section 9(b)(3) requires that an employee be found to be a guard where a duty to enforce rules to protect property exists, which necessarily creates the potential for a divided loyalty.

Further, the Board has long held that an employee need not perform duties at a stationary facility in order to be found a guard under Section 9(b)(3). In 1953, the Board held in *Armored Motor Services Co.*, 106 N.L.R.B. 1139 (1953), that armored car guards are guards within the meaning of Section 9(b)(3), because

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[16] *See also A.W. Schlesinger Geriatric Center*, 267 N.L.R.B. 1363 (1983); *Reynolds Metals Co.*, 198 N.L.R.B. 120 (1972).

they possess a duty to their employer to enforce rules to protect property. The Board has continued to adhere to this policy because of the potential for a conflict of loyalty.[17] The fact that armored car employees work out of a vehicle is not determinative. What is determinative is the fact that these types of employees are guards because they have the duty on behalf of their employer, envisioned by Section 9(b)(3), to enforce rules to protect the property of their employer and its customers, so that a divided loyalty could exist between the armored car guards and the employees of the employer whose property they are protecting when they are delivering the valuables.[18] When Congress enacted Section 9(b)(3) it precluded the Board from certifying certain bargaining units and labor organizations precisely to avoid such divided loyalties.

In accordance with the foregoing analysis, the Board has historically held that courier-guards are statutory guards because they have, as a consequence of their employment relationship, the duty to *enforce rules* to protect property of their employer and its customers. The Board in the instant matter, contrary to this historical analysis, has placed unnecessary emphasis on the fact that a courier-guard's vehicle was not always secured, despite the fact that the potential for a divided loyalty still exists. The Board in *Brinks, Inc.*, 226 N.L.R.B. 1182 (1976), held that unarmed courier-guards were statutory guards because they possessed the duty to enforce rules to protect property. The Board continued to hold that pursuant to Section 9(b)(3), courier-guards were guards within the meaning of Section 9(b)(3) in *MDS Courier Service Inc.*, 248 N.L.R.B. 1320 (1980), and in a series of

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[17] *See Dunbar Armored Express Inc.*, 211 N.L.R.B. 687 (1974). *See also NLRB v. Brinks, Inc.*, 843 F.2d at 453.

[18] *Wells Fargo Armored Service Co.*, 270 N.L.R.B. 787 (1984), *enforced*, 755 F.2d 5 (2d Cir.) *cert. denied* 474 U.S. 901 (1985). The Second Circuit held, "the Board and reviewing courts have consistently found that although in enacting Section 9(b)(3) Congress may have focused primarily on the particular situation in *Jones & Laughlin*, the broad language which it chose to use encompasses not only merely divided loyalties at a company plant, but the potential for divided loyalty that arises whenever a guard is called upon to enforce rules of his employer against any fellow union member."

Purolator cases.[19] The Board, as well as the Court of Appeals for the Second Circuit, in these Purolator cases, found the courier-guards to be statutory guards placing emphasis on the duty these employees possessed to enforce rules to protect property and the consequential creation of the divided loyalty dilemma. Any minor variations in security training, security clearance and other secondary considerations were not found controlling.

In 1990, in its decision in *Purolator IV*, the Board departed from the interpretation of Section 9(b)(3), upon which the entire security industry had structured its affairs, holding that the existence of a duty to enforce rules to protect property, as a consequence of the employment relationship, was not the controlling factor in determining an employee's status under 9(b)(3). In *Purolator IV*, the Board ignored the employment relationship, which included a duty to enforce rules to protect property and the resulting divided loyalty dilemma, and substituted its views regarding levels of security as the *sine qua non* of guard status. The Board announced its "direct and substantial" test, which changed the analysis to a cumulative examination of secondary security factors, thus disregarding the language of Section 9(b)(3) relating to the duty "to enforce rules". This analysis effectively eliminates the goal of Section 9(b)(3) to avoid divided loyalty. By embracing this test, the Board lost focus of the purpose and policy of Section 9(b)(3), because the new analysis places the entire emphasis on how security is effectuated to determine guard status, not whether the duty to *enforce rules* to protect the property of an employer exists. In short, the Board commenced up the "slippery slope" of evaluating the security an employer provides its customers by ascertaining if any "police type functions" exist, while ignoring that guard status is solely a result of the existence of an employment relationship which includes a duty to enforce rules to protect property. Simply put, guard status has nothing to do with the various methods upon which security is accomplished, which varies from situation to situation, customer to customer.

The Eighth Circuit, by upholding the Board in the instant matter, holding that the analysis should be whether the employees

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[19] *Purolator Courier Corp.*, 266 N.L.R.B. 384 (1983), *enforced*, 732 F.2d 43 (2d Cir. 1984) (*Purolator III*); *Purolator Courier Corp.* 265 N.L.R.B. 659 (1982) (*Purolator II*); *Purolator Courier Corp.*, 254 N.L.R.B. 599 (1981) (*Purolator I*).

are "engaged directly and substantially in the protection of customer property", has similarly missed the mark, and has incorrectly placed the emphasis on relatively unimportant secondary indicia of how security is effectuated to determine guard status.[20] The result in the instant matter illustrates the inherent flaw in such an analysis.[21] Here, it is undisputed that the courier-guards employed by Pony have an affirmative duty to enforce rules to protect the property of Pony and its customers. This duty of loyalty is appropriately expressed in the words "Deter, Detect and Report". Applying a test which examines if the employees are engaged "directly and substantially" in the protection of property, results in an analysis of the level of security and non-determinative secondary factors, such as, whether an employee

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[20] Any argument that Pony is precluded from questioning the soundness of the decision in *Purolator IV*, because it failed to raise this argument before the Board, is entirely without merit. Pony raised, as an affirmative defense to the Region's motion for summary judgment, the lack of validity of the Region's certification. In proceedings at this stage, pleading an affirmative defense was the only procedure available to Pony, and as the Board granted the Region's motion for summary judgment, Pony was denied the opportunity to raise, as a defense, an attack on the validity of the *Purolator IV* decision in a post hearing brief to an Administrative Law Judge or to the Board. Further, when the case was before the Region, in the forum of a pre-election hearing, there was no reason to argue the validity of the *Purolator IV* decision because the pre-election hearing is a non-adversarial fact-finding proceeding and the *Purolator IV* decision was not brought into the context until the Regional Director's Decision and Direction of Election. The Board denied Pony's Request For Review of this Decision. In any case, the Eighth Circuit considered Pony's argument regarding the soundness of the *Purolator IV* decision. *See also Brinks, Incorporated of Florida*, 276 N.L.R.B. 1 (1985) (where the Board held that Brinks could not be precluded from raising the issue of the guard status of employees in question in an unfair labor practice proceeding when it failed to raise the issue in a prior representation hearing, solely because the statutory issue of guard status constitutes special circumstances).

[21] The lack of validity of any argument that the "direct and substantial" test adopted by the Board and the Eighth Circuit is not a deviation from the prior standard used by the Board and the courts is illustrated by the simple fact that the Board by applying this new test found courier-guards not to be statutory guards where it had in the past held that such individuals were in fact guards within the meaning of Section 9(b)(3). *MDS Courier, supra*.

is called upon to use force in order to protect property, the amount of "official" training given to the employees, and/or the amount of time spent performing guard duties. The above ignores the one determinative factor, whether as a consequence of the employment relationship, a duty exists to *enforce rules* to protect property, which if an individual was called upon to enforce against non-guards in the same labor organization would create a divided loyalty. This is the essence of Section 9(b)(3).

To assert, as the Eighth Circuit does, that any pickup and delivery drivers would take the same precautionary procedures as the courier-guards is simply unfounded, as ordinary drivers are under absolutely no duty to enforce rules to protect the property of their employer's customers.[22] They are required only to pick up or deliver their loads. There is absolutely no affirmative duty placed on "regular" pickup and delivery drivers during transit or upon arrival at the destination to enforce rules to protect the property they are transporting. The comparison is simple, courier-guards have an affirmative duty to enforce rules to protect the property of customers while it is in their custody, while "ordinary" pickup and delivery drivers have absolutely no such duty.[23] To permit the courier-guards to be in the union which admits to membership persons other than guards, such as drivers, would surely create a risk of divided loyalty, as courier-guards are plainly charged with an affirmative duty to protect the property of customers against other individuals. This duty could easily conflict with obligations the courier-guards may have to, or feel towards, "regular" drivers who are fellow union members. It is clear that the "direct and

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[22] Indeed, the Second Circuit rejected such an oversimplification in *Truck Drivers Local 807 v. NLRB*, *supra*.

[23] The Eighth Circuit's reliance on Pony's memo which instructed employees to refer to the courier-guards as "courier-guards" to support a finding that they are not statutory guards clearly reflects a misunderstanding of the law and of Pony's intent. While the job title is certainly not determinative of an individual's status as a guard under the Act, it follows that directing employees to use such a title does not determine their status. Further, the direction of employees to use a certain job title actually denotes an intention of Pony to comply with Section 9(b)(3) and emphasize to employees that they are not just expected to be "couriers" but *courier-guards*, thus emphasizing the duty to enforce rules to protect property.

substantial" test adopted by the Board and the Eighth Circuit is a complete deviation from the standard previously applied by the Board and the courts and is contrary to the purpose and policy behind Section 9(b)(3), for it fails to assess the divided loyalty dilemma. Further, by adopting this test, the Eighth Circuit has allowed the Board to ignore the fundamental distinctions in the language of the Act and thus to exceed the restrictions placed on it by virtue of Section 9(b)(3), because it has failed to recognize that Section 9(b)(3) does not require that a guard "protect property". Rather, Section 9(b)(3) requires that a guard "enforce rules to protect property". Therefore, based on the foregoing, it is respectfully requested that the Petition for a Writ of Certiorari be granted.

B. The Eighth Circuit Failed to Set Out a Basis for its Departure from the Previous Legal Standard Utilized to Determine Guard Status under Section 9(b)(3)

In addition to the above, the integrity of the administrative process requires that the Board and the Eighth Circuit explain the basis for their deviation from the long established history of the caselaw interpreting the language of Section 9(b)(3).[24] Here, the Board and the Eighth Circuit have provided no rational explanation regarding their complete deviation from the consistent interpretation of Section 9(b)(3), that guard status under Section 9(b)(3) will be found where a duty *to enforce rules* to protect property exists. If such a duty exists, the divided loyalty dilemma is created, which in accordance with the purpose and policy of the Act must be avoided. It is well established that the courts may not accept appellate counsels' post hoc rationalizations for agency action.[25] Therefore, it is respectfully requested that the Petition for a Writ of Certiorari be granted because a basis for the deviation from established law and policy has not been established.

C. The Decision of the Eighth Circuit is in Direct Conflict with an Earlier Decision of the Second Circuit which Held that Courier-Guards are Guards within the Meaning of Section 9(b)(3)

The Second Circuit's decision in *Teamsters Local 851 v. NLRB (Purolator Courier Corp.)*, 732 F.2d 43 (2d Cir. 1984), is in direct

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[24] *Watt v. Alaska*, 451 U.S. 259, 273 (1981); *NLRB v. Metropolitan Ins. Co.*, 380 U.S. 438 (1965). *See NLRB v. Brown*, 380 U.S. 278; *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941). *See* n. 10 *infra*.

[25] *Metropolitan Ins. Co., supra*.

conflict with the decision of the Eighth Circuit in this case, and thus pursuant to Rule 10.1(a), Rules of the Supreme Court of the United States, the Supreme Court should exercise its discretion and grant the instant Petition for a Writ of Certiorari. The Second Circuit in *Teamsters Local 851* held that the Board's finding that Purolator's courier-guards were guards comported with the statutory language and the legislative history of Section 9(b)(3), noting that the Board's interpretation has been consistent for thirty (30) years. The Second Circuit has embraced the standard that has been urged herein as the appropriate standard for determining guard status, which is that the purpose and policy of Section 9(b)(3) and the legislative history require a finding of guard status where the employment relationship creates a duty to *enforce rules* to protect the property of the employer or its customers.

The Second Circuit's decision and the Board's historical standing are clearly in direct conflict with the Eighth Circuit's "direct and substantial" analysis which emphasizes the level of security and omits the directives of Section 9(b)(3), all of which is at the expense of the purpose and policy behind Section 9(b)(3) of avoiding the divided loyalty dilemma.[26] This conflict in the Circuits must be reconciled, for an entire industry of security companies providing security and secured transportation throughout the United States needs a clear and consistent standard regarding the interpretation of Section 9(b)(3) in order to do business.[27] Any argument that the Second Circuit would hypothetically reach the same decision as the Eighth Circuit on the facts present in the instant matter is clearly without merit. The only relevant point of inquiry is to determine if the Circuits have adopted analyses which are clearly in conflict, as are the standards laid down by the Eighth and Second Circuits.

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[26] Indeed, the Eighth Circuit's decision is also in direct conflict with other Circuits regarding the intent of Section 9(b)(3), as reflected in the critical inquiry into the existence of the divided loyalty dilemma. *See NLRB v. Brinks, Inc., supra; Truck Drivers Local 807 v. Brinks, supra.*

[27] In fact, many security companies do business across the entire country; therefore, a clear consistent national standard is necessary in order for these companies to comport their operations with the law.

If two legal standards have been set down which are substantially different, as the standards of the Eighth and Second Circuits are, the standards must be reconciled, regardless of any distinction in the facts in the cases. Further, this issue is of first impression and is of national concern due to the great influence the security industry has on interstate commerce. Therefore, the risk is significant that interstate commerce could be severely impeded if the proscribed divided loyalty was allowed to exist, contrary to the purpose and policy of the Act.[25] Finally, there is no question that this issue will continue to arise as it has done in the past, and without any clear standard, security enterprises which employ employees charged with the duty to enforce rules to protect property will not know whether non-guard labor organizations may represent their employees, which will create labor strife. Thus, the divided loyalty Section 9(b)(3) sought to eliminate will be permitted to exist, contrary to the purpose of policy of the Act, as set forth in Section 9(b)(3).

VIII. CONCLUSION

For the foregoing reasons, it is respectfully requested that a Writ of Certiorari should be issued to review the judgment and opinion of the Eighth Circuit Court of Appeals.

Respectfully submitted,

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May 24, 1993

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[25] 29 U.S.C. § 151.

Nos. ~~92-1292~~ and 92-1485

In The

Supreme Court of the United States

October Term, 1992

PONY EXPRESS COURIER CORP.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Pony Express Courier Corp., again respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Eighth Circuit rendered on December 10, 1992.

OPINION BELOW

The opinion of the Court of Appeals, reported at 981 F.2d 358, appears in the Appendix submitted as part of the petition for writ of certiorari filed with this Court on March 10, 1993 (A. 1-18). The decision and order of the Respondent, National Labor Relations Board, reported at 306 NLRB No. 22, and the Board Regional Director's

unreported decision and direction of election in the underlying representation case both appear in the aforementioned Appendix (A. 21-43).[1] On or about May 10, 1993, the Board filed it's brief in opposition contending that the petition for certiorari should be denied. This reply brief is submitted pursuant to Rule 15.6, Rules of the Supreme Court of the United States.

REASONS FOR GRANTING THE WRIT

In the petition for writ of certiorari, Pony argues that the recent decision of the Eighth Circuit Court contravenes a 1984 holding of the Second Circuit Court which dealt directly with the application of Section 9(b)(3) guard status to "Courier Guard" employees (Pet. 14-18). Further, Pony argues that the Board's new standard for determining guard status, as enunciated in its 1990 *Purolator IV* decision and the instant case, is a "marked departure" from past Board decisions on this subject and is clearly inconsistent with the legislative purpose and policy of Section 9(b)(3) of the Act (Pet. 18-29).

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[1] Again, for convenience, Petitioner is hereinafter referred to as "Pony" or "Pony Express"; Respondent National Labor Relations Board is hereinafter referred to as the "Board"; and Teamsters Local 120, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO (charging party in the proceedings before the Board), is hereinafter referred to as the "Union." References to the "Act" are to the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.*

I. Decision of the Eighth Circuit Court in Conflict with Earlier Decision of Second Circuit Court that Courier Guards are Section 9(b)(3) Guards.

Pony argues in its petition that the 1984 decision of the Second Circuit in *Local 851, International Brotherhood of Teamsters v. NLRB*, 732 F.2d 43 (2d Cir. 1984), is the only other appellate court decision "dealing directly with the application of Section 9(b)(3) to Courier Guard employees;" that the Eighth Circuit's recent decision upholding the Board's *Purolator IV* rationale on 9(b)(3) guard status is "now in direct conflict with the earlier decision;" that this Section 9(b)(3) issue is "likely to reoccur in these and other appellate circuits;" and that the "instant conflict is one that can only be resolved by the Supreme Court" (Pet. 17-18). In opposition, the Board contends that the Eighth Circuit's holding is not in conflict with the earlier decision of the Second Circuit in that the "job duties of the courier-guards found to be statutory guards in Local 851 differ significantly from those of petitioner's employees" (Board Brief 15). This contention, we submit, is without merit.

In Local 851 the Second Circuit Court was satisfied that the Board's initial finding that the Purolator drivers were Section 9(b)(3) guards was supported by substantial record evidence; and that court, in applauding the Board's 30-year "consistent interpretation . . . of the statutory term to encompass more than plant guards" described the drivers' job duties as follows:

> The union contends that the board's interpretation of § 9(b)(3) contravenes both the legislative history and purpose of that statute, because the Purolator employees do not "guard" any property, but are merely truck drivers employed by Purolator. The board and Purolator contend that the drivers are "guards" because, although

> unarmed, they wear uniforms, are entrusted with a wide variety of valuable commodities ranging from cash letters to controlled drugs and radioactive pharmaceuticals, are bonded and subjected to security clearance, are often given keys to the premises and security vaults of customers, are held responsible for the safekeeping of packages in their vehicles, and are required to insure that their entry or departure does not impair the security of customers' premises.

732 F.2d at 44

The Board concedes that Pony's Courier Guards – like those in the Local 851 case – are "entrusted with a variety of valuable goods," but then contends incorrectly that the "similarity in their respective duties ends there" (Board Brief 16). The Board argues that Pony's Courier Guards are "not given keys to access a substantial number of customers' premises;" that the "record does not demonstrate that (Pony's) courier-guards have access to customers' security vaults;" that Pony does not "hold its courier guards responsible for safekeeping of packages in their vehicles;" and, further, Pony's Courier Guards "generally disregard the company rule requiring them to keep their delivery vehicles locked at all times" (Board Brief 16). However, such arguments by the Board ignore much of the record evidence, as did the Regional Director in his June 1991 decision and direction of election.

First of all, the fact that Pony had a limited number of keys and secret codes for gaining access to customers' premises during their non-work time in 1991 did not establish that they were in use only a small percentage of the time. Moreover, a Section 9(b)(3) analysis is not quantitative but qualitative, and the limited performance of property protection duties during working time should

not detract from an employee's guard status. Until the *Purolator IV* decision in 1990, the Board had consistently held that mere part-time performance of protective and enforcement duties, which creates the threat of divided loyalty, brings an employee within the purview of the purpose and policy of Section 9(b)(3).[2] It is the nature of the job duties of the Courier Guards and not the percentage of time that they spend performing such duties which should be controlling in determining 9(b)(3) guard status.

Also, the fact that a Pony Courier Guard may seldom be called upon to deactivate a customer's alarm system when entering the premises, or reactivate it upon leaving, should not detract from his express responsibility to secure the customer's premises and property when entering and leaving during non-working hours. As the Board's representation case record shows, over half of all pick-ups and deliveries are made *before* and *after* a customer's normal business hours, and such pick-ups and deliveries are normally made in controlled-access areas not open to the public during those times, thus necessitating the need for access keys and codes. The fact that a Pony Courier Guard may not have direct access to a customer's security vault while on the premises is immaterial.

Similarly, the contentions that Pony does not hold its Courier Guards "responsible for safekeeping of packages in their vehicles," and that said Courier Guards "generally disregard the company's rule requiring them to keep

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[2] See, e.g., *A.W. Schlesinger Geriatric Center*, 267 NLRB 1363 (1983); *Raymond Metal Products Co.*, 223 NLRB 127 (1976); *Reynolds Metals Co.*, 198 NLRB 120 (1972); *Walterboro Manufacturing Co.*, 106 NLRB 1383 (1953).

their delivery vehicles locked at all times" is likewise unsupported by the record. Pony Courier Guards have been instructed that vehicle doors and windows are required to be closed and locked when said vehicles are left unattended, and all keys are to be taken by the Courier Guard when he leaves his assigned vehicle. It is a published security rule violation, for which disciplinary action may be taken, to leave a courier vehicle unlocked during a route. The fact that one pro-union Courier Guard (Dorton) chose to violate this rule by leaving his vehicle "unlocked with the engine running during brief stops" does not warrant the broad conclusion that, in practice, all Pony Courier Guards are equally as careless and indifferent to the security of their assigned cargoes.

The job duties and responsibilities of Pony Courier Guards in the case *sub judice* are very similar to those of the Purolator courier-guards found to be 9(b)(3) guards in the 1984 Second Circuit decision and, most importantly, the basic function of both groups of employees "involved, directly and substantially, the protection of the valuable property" of their respective employer's customers. *Purolator Courier Corp.*, 266 NLRB 384, 385 (1983), affirmed 732 F.2d 43 (2d Cir. 1984). Clearly, there is a conflict between the decisions of the Second and Eighth Circuits which should be resolved by the Supreme Court.

II. Decision of the Eighth Circuit Court is Appropriate for Supreme Court Determination Because Issues Raised in this Case Present Substantial Questions with Regard to National Labor Policy.

The Board contends that Pony is "jurisdictionally barred" from arguing that the *Purolator IV* decision represents a "departure" by the Board from its earlier case

precedent and that it conflicts with the legislative purpose of Section 9(b)(3), contending that this legal challenge was not raised before the Board during its proceedings and may not now be considered by this Court, absent extraordinary circumstances, pursuant to Section 10(e) of the Act (Board Brief 9-10). However, it is submitted that Pony has adequately preserved this issue for review.

Section 10(e), 29 U.S.C. § 160(e), was enacted to ensure that the Board has an opportunity to apply its special expertise to an issue before that issue is presented to an appellate court. See *Marshall Field & Co. v. NLRB*, 318 U.S. 253, 256 (1943) (per curiam); *NLRB v. Best Products Co.*, 765 F.2d 903, 909 (9th Cir. 1985). Section 10(e) bars judicial review when no objection has been filed, see *Woelke and Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); or when only an ambiguous, general objection to the decision has been filed, see *Marshall Field*, 318 U.S. at 255-56. However, an objection will meet the statutory requirement if it is not "so ambiguous as to be totally ineffective to adequately apprise the Board" that the issue is disputed. *Best*, 765 F.2d at 909. Once an issue is raised before the Board, any party may litigate the issue on appeal. See *Consolidated Freightways v. NLRB*, 669 F.2d 790, 794-95 (D.C. Cir. 1981).

In its June 1991 request for review of the Regional Director's decision and direction of election, Pony argued that his decision "raises a substantial question of law or policy because of his clear departure from officially reported Board precedent on . . . the Section 9(b)(3) guard issue . . . " as well as containing "erroneous findings on substantial factual issues that prejudicially affect the rights of the employer." In arguing a departure from

"officially reported Board case precedent," Pony pointed out that, in all material respects, the "factors and job responsibilities of courier-guards in the New Brighton Branch are virtually identical with those employees found to be 9(b)(3) guards in earlier Board cases," citing the three *Purolator* cases of the early 1980s as well as *MDS Courier Service, Inc.*, 248 NLRB 1320 (1980) and *Brinks Incorporated*, 226 NLRB 1182 (1976). However, the Board denied Pony's request for review on the ground that it "raises no substantial issues warranting review". Thereafter, in its December 1991 response to the Board's order to show cause as to why summary judgment should not be granted, Pony again argued that the "Regional Director's decision raised substantial questions of law or policy because of his departure from officially reported Board precedent on both the Section 9(b)(3) guard issue and the Section 2(11) supervisory issue . . . ". It is submitted that, by advancing this argument in these briefs, the ultimate question of the reasonableness of the Board's *Purolator IV* decision was implicitly raised at each step of the Board's representation and unfair labor practice proceedings and was preserved for review by both the appellate court and this Court. *See* e.g., *NLRB v. U.S. Postal Service*, 833 F.2d 1195, 1202-1203 (6th Cir. 1987); *NLRB v. Wayne Transp., a Division of Wayne Corp.*, 776 F.2d 745, 748-49 (7th Cir. 1985); *NLRB v. Southwest Security Equipment Corp*, 736 F.2d 1332, 1336 (9th Cir. 1984), *cert. den.*, 470 U.S. 1087 (1985); *Amcar Division v. NLRB*, 596 F.2d 1344, 1350, n. 8 (8th Cir. 1979).

The Board further contends that the *Purolator IV* standard does not represent a "basic change" in Board policy with respect to the status of courier-guards under Section 9(b)(3), but "simply refines that policy;" and, further, that

even if the *Purolator IV* standard is deemed a revision of policy, the Board has the authority to modify its construction of Section 9(b)(3) so long as that modification is "rational and consistent" with the Act (Board Brief 10-13). However, the Board's argument studiously ignores the background and history of Section 9(b)(3) which was enacted by Congress in 1947 because of the potential divided loyalty problem that still exists today in the security industry of which Pony Express is an integral part. A review of Board decisions on the guard status of courier employees for the period of 1976-1990, including the three *Purolator* decisions of the early 1980's, clearly shows that the *Purolator IV* standard is a significant change in Board policy and more than just a refinement or reaffirmation of its existing policy (Pet. 15-16). The Board's decisions in *Purolator IV* and the instant case invite a narrower quantitative analysis of the duties of a courier-guard which, in effect, erodes the legislative purpose of Section 9(b)(3), i.e. minimizing the potential danger of divided loyalties in employees "vested with the authority to enforce rules and regulations for the protection of company property." *McDonnell Aircraft Company v. NLRB*, 827 F.2d 324, 326 (8th Cir. 1987).

Certainly, the Board has the power the change its construction of Section 9(b)(3), but that change must be reasonable and not inconsistent with the statutory interpretation of that provision of the Act. Section 9(b)(3) defines a "guard" as "any individual employed . . . to enforce against employees and other persons rules to protect property of the employer . . . ," 29 U.S.C. § 159(b)(3); and the Board has long held that it is immaterial that the individual protects property belonging to the employer's customers rather than to his employer

while not on the premises of his employer.[3] The "appropriate categorization of employees as statutory guards will depend largely on the extent to which they protect [company] property." 827 F.2d at 326. See, also, *NLRB v. Brinks, Inc. of Florida*, 843 F.2d 448, 451-52 (11th Cir. 1988); *Truck Drivers' Local Union No. 807 v. NLRB*, 755 F.2d 5, 8-11 (2nd Cir. 1985); *International Brotherhood of Teamsters, etc. v. NLRB*, 568 F.2d 12, 16 (7th Cir. 1977). The Board's new restrictive interpretation of Section 9(b)(3), as articulated in *Purolator IV* and the instant case, is unreasonable and clearly inconsistent with the purpose and policy of that statutory provision. Section 9(b)(3) defines guards in all industries, yet the Board has now articulated a different standard depending on the type of business engaged in by the subject employer. It is submitted that Section 9(b)(3) should be clarified by this Court to provide uniformity in its application to employers in the security industry and other industries.

CONCLUSION

For the reasons discussed herein, as well as in the petition filed on March 10, 1993, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit Court of Appeals.

Respectfully submitted,

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[3] See *Armored Motor Services Co.*, 106 NLRB 1139, 1140 (1953).